94-1941

No. (2)

Supreme Court, U.S.
FILED
MAY 26 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF CONTENTS

	Page
Appendix A (Court of Appeals opinion (Jan. 26, 1995))	1a
Appendix B (District Court opinion (Apr. 29, 1994))	53a
Appendix C (Supreme Court denial of certiorari (May 24, 1993))	132a
Appendix D (Court of Appeals opinion (Oct. 5, 1992))	134a
Appendix E (District Court opinion (June 14, 1991))	158a
Appendix F (Court of Appeals order on rehearing (Apr. 28, 1995))	246a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94-1667, 94-1712

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A COURTLAND SPOTTS, III, DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLEES

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III,

President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A COURTLAND SPOTTS, III, DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLANTS

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL

ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

Argued Sept. 28, 1994

Decided Jan. 26, 1995

Before: NIEMEYER, Circuit Judge, PHILLIPS, Senior Circuit Judge, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Senior Judge WARD joined. Senior Judge PHILLIPS wrote a separate dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

At issue is the important question of whether a state may sponsor single-gender education without violating the Equal Protection Clause of the Fourteenth Amendment.

In *United States v. Commonwealth of Virginia, (VMI I)*, 976 F.2d 890 (4th Cir.1992), we concluded that single-gender education was "pedagogically justifiable," *id.* at 897, and the United States has acknowledged in this case that state sponsorship of single-gender education, if provided to both genders, is not per se a denial of equal protection. Even though single-gender college education yields benefits to both genders, it nevertheless has the secondary effect of excluding men from the women's college and women from the men's college, an effect that becomes yet more complicated when the programs at the two colleges differ to some degree.

We must decide now whether the Commonwealth of Virginia's proposal (1) to continue to provide a single-gender military-type college education for men at the Virginia Military Institute (VMI), (2) to provide, beginning in 1995, a single-gender education with special leadership training for women at Mary Baldwin College, and (3) to continue to provide other forms of college education, including military training, for both men and women at other colleges and universities in the state is constitutionally permissible. After applying a heightened intermediate scrutiny test specially tailored to the circumstances before us and imposing specific performance criteria on the implementation of Virginia's proposal, we affirm the district court's judgment approving the proposal.

I

VMI, established by the Commonwealth of Virginia in 1839 as a four-year military college, has a current enrollment of approximately 1,300 men. The college has always admitted only males and, through an adversative military-type training, it seeks to

graduate them as "'citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary.'" *VMI I*, 976 F.2d at 893. In *VMI I*, we affirmed the district court's factual findings, based on studies in evidence, that such a single-gender education is pedagogically justifiable, both for males and females. We concluded:

> It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

Id. at 897.

We also affirmed findings of fact that coeducation would destroy aspects of VMI's program which lie near the core of its holistic system and that the admission of women therefore would deny them the very benefit they sought by their admission. The district court found that coeducation would require fundamental changes (1) to the adversative method which pits male against male because that method would not produce the same results when a male is set against a female; (2) to the absence of privacy which was found to be essential to the leveling process; and (3) to physical training, requiring VMI to adopt, as was required at the U.S. military academies, a dual-track program for men and women in order to achieve equality in effect. We concluded that coeducation at VMI would thus

> deny those women the very opportunity they sought because the unique characteristics of

> VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

Id. at 897 (footnote omitted).

In view of these findings, we did not direct the Commonwealth of Virginia to change VMI to a coeducational college, but we did find that its failure to offer women comparable benefits constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. We remanded the case to the district court, directing it to require Virginia and the other defendants to formulate, adopt, and oversee the implementation of a remedial plan. In giving Virginia the opportunity to select its course to correct the Fourteenth Amendment violations, we did not suggest any particular remedy, but allowed that Virginia might properly decide to alter the program and admit women to VMI, or establish parallel institutions or parallel programs, or abandon state support, leaving VMI the option to pursue its own policies as a private institution.

On remand, Virginia designed a proposal to implement a parallel program at Mary Baldwin College providing women with single-gender education, coupled with special leadership training. Following a trial on the appropriateness of the remedy, the district court approved the plan and directed Virginia "to proceed with all deliberate speed in implementing the Plan and to have the Plan operational for the academic year commencing in the Fall of 1995." *United States v. Commonwealth of Vir-*

ginia, 852 F.Supp. 471, 485 (W.D.Va.1994). The court retained jurisdiction to supervise implementation of the plan and required a status report every six months.

The plan approved by the district court provides for Virginia to establish with state funds the Virginia Women's Institute for Leadership (VWIL) as part of the undergraduate program at the otherwise privately funded Mary Baldwin College, a women's liberal arts college founded in 1842 in Staunton, Virginia, about 35 miles from VMI. The plan is the product of a task force, chaired by Dr. James D. Lott, Dean of Mary Baldwin College, which set as its goal the task of designing a program at Mary Baldwin College to produce "citizen-soldiers who are educated and honorable women, prepared for varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service." Because its mission is similar to VMI's mission, VWIL would have its students pursue the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development. In designing the program at Mary Baldwin College, however, the task force concluded that aspects of VMI's military model, especially the adversative method, would not be effective for women as a group, even though the task force concluded that some women would be suited to and interested in experiencing a "women's VMI." The task force concluded instead that its mission and goals could better be achieved by designing a program which deemphasized the military methods associated with the "rat line," *see VMI I*, 976 F.2d at

893, utilizing instead a structured environment emphasizing leadership training.

In addition to the standard bachelor of arts program offered at Mary Baldwin College, VWIL students would be required to complete, as a "minor," core and elective courses in leadership. A student in the VWIL program would be required to take courses in leadership communications; theories of leadership; ethics, community, and leadership; and a leadership seminar or semester of independent research on a topic relevant to women and leadership. Students would also be required to participate in Saturday seminars sponsored by upperclass students on designated subjects. Outside of the classroom, students would be required to complete a leadership externship during which they would work off campus in the public or private sector for up to one semester and to participate in a speaker series in which each VWIL class would be responsible for bringing outstanding leaders to speak on campus. Finally, all VWIL students would be required to organize and carry out community service projects.

While students at VWIL would be required to participate in four years of ROTC and in an ROTC summer camp, VWIL would not be organized under the pervasive military regimen that exists at VMI. Nevertheless, in addition to standard ROTC training, the students would conduct "leadership laboratory activities" which might incorporate aspects of military training, and they would participate in a newly-established Virginia Corps of Cadets, a uniformed military corps comprised of the all-female VWIL, the all-male VMI, and the coeducational Virginia Tech ROTC corps. The Virginia Corps of Cadets would be largely ceremonial.

Finally, VWIL students would be required to take and pass eight semesters of physical education, a portion of which would be devoted to health education courses. These programs would include athletics, physical training and a "cooperative confidence building program" to be held twice a week.

The VWIL program would be implemented at Mary Baldwin College with its faculty, although VMI faculty would conduct some ROTC training and teach some ROTC courses at Mary Baldwin College. The program would be funded by the Commonwealth of Virginia, providing a per student payment equal to the current annual appropriation paid per cadet at VMI. The program, which task force members expect would have about 25 to 30 students in the first year, would also be given a permanent endowment of $5.46 million. The out-of-pocket expenses for students to attend VWIL is expected to be no greater than those of students attending VMI, and VWIL students would be eligible for the same financial aid programs as are available to VMI cadets.

The experts for both sides acknowledge that the proposed VWIL program differs from VMI in methodology since VWIL would not rely on the pervasive military life and adversative methods to achieve its goals. Members of the task force, who are professionals in education, testified that the different approach was selected principally to address the different educational needs of most women. Dr. Heather Anne Wilson, a member of the task force, summarized the thinking, stating that "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt. . . . What [women] need is a system that builds

their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." Mary Baldwin College, which participated actively in the design of the VWIL program, observed in its amicus brief regarding the differences between the methodology used at VMI and that proposed for VWIL:

> It would have been possible to design the VWIL program to more closely resemble VMI, with identical physical fitness standards and adversative techniques associated with the rat line. Such a program would have been easier to design and to defend against the arguments raised by the government and its amici. But it would have been a paper program, with no real prospect of successful implementation. [Mary Baldwin College] believes it would be professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.

While the task force did not conduct any scientific survey on demand for the proposed VWIL program, or alternatively for a women's VMI, several members expressed the opinion, based on some field data, that demand would be "significant" for VWIL but not for a women's VMI, and some expressed doubt that enough women would be interested in a women's VMI to make it work.

II

The United States contends that the remedial program offered by the Commonwealth of Virginia does not meet the requirements of the Fourteenth Amendment's Equal Protection Clause. It states that "[the

proposed remedy] does not correct the constitutional violation, *i.e.*, the denial to women of VMI's unique educational methodology. As the district court recognized, the program 'differs substantially' from the educational program offered at VMI." At oral argument the United States argued that any parallel program would have to be "identical" in substance and methodology to that of VMI. The United States maintains further that by not offering coeducation at VMI, the Commonwealth of Virginia is relying on false stereotypes and generalizations "that women are not tough enough to succeed in VMI's rigorous, military-style program." As the United States summarized its position:

> [T]he fact remains that men have [this] special educational opportunity available to them and women do not, and that as a result VMI graduates have been very successful in both public and private careers. This suit was brought on behalf of those women who want to go to VMI precisely because it is such a demanding and challenging school. The remedial plan approved by the district court does nothing for them.

The United States urges that we enter an order directing Virginia to admit women to VMI as the only remedy for correcting the past constitutional violation.

III

Equal protection of the law requires that persons similarly circumstanced be treated alike, *Reed v. Reed*, 404 U.S. 71, 76 (1971), but equal protection does not deny states the power "to treat different classes of persons in different ways." *Id.* at 75.

When the state classifies by defining a group to whom a regulation applies or a benefit is conferred, the classification " 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .' " *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). In striking down a state statute that preferred males over females as administrators of wills in order to further governmental efficiency, the Court provided the seed for the formulation of a test utilizing an intermediate level of scrutiny for state regulations that classify by gender. While *Reed* implicitly applied a heightened level of scrutiny, the formulation of this standard came later. As this test has finally been articulated, to withstand this level of scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Orr v. Orr*, 440 U.S. 268, 279 (1979) (internal quotations omitted); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

In *Hogan* the Court outlined a two-step process that inquires (1) whether the state's objective is "legitimate and important," and (2) whether "the requisite direct, substantial relationship between objective and means is present." *Id.* at 725. The Court explained that tailoring the means to fit the legitimate and important purpose is necessary to assure that the classification is the product of "reasoned analysis" rather than the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-26. In *Hogan*, the Court held unconstitutional Mississippi's women-only admissions policy of a state supported

nursing school. In doing so, the Court relied on the first prong of its articulated test, finding that the state's purported objective to "compensate[ ] for [past] discrimination against women," *id.* at 727, was in effect an effort to " 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior." *Id.* at 725. The state's purported justification, the Court observed, perpetuated an archaic and stereotyped view of women as nurses. Thus, affirmative action in favor of women based on an outdated and unsupported assertion that such protection was needed was held not to be an important governmental objective. *Cf. Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a state statute, which preserves the husband as "the head and master of the [marriage] partnership or community of gains" by providing the husband, and not the wife, with the right to unilaterally dispose of jointly held property, was not a legitimate and important state objective). The Court in *Hogan* did not decide, however, and indeed appears deliberately to have left open, the question of whether states could provide single-gender education in other circumstances. *See* 458 U.S. at 720 n. 1.

In undertaking the first step of the *Hogan* analysis to determine whether the state's objective is "legitimate and important," a court should not substitute its priorities of value over those established by the democratically chosen branch. To remain true to its constitutional role and avoid the pitfalls of a substantive evaluation of proper governmental objectives, which would amount to a "substantive equal protection analysis," a court should, at this step, deferentially consider only whether the regulation is important to a legitimate governmental purpose. The cautious approach to this first prong of intermediate scrutiny effectively redirects the court's focus on evaluating the state's means for obtaining its objective, which is the second step to the *Hogan* analysis. Giving greater scrutiny to the selection of means than to the proffered objective recognizes an appropriate deference to legislative will and at the same time assures that the legislature does not accomplish its objectives through an unequal application of the law. The substantive equal protection portion of the analysis cannot, however, be entirely diminished, for the courts can never approve a pernicious legislative purpose or one that does not comport with traditional notions of the proper role of government. The proper relative balance under this "procedural equal protection analysis" thus results in a court scrutinizing closely the procedural mechanism adopted by the legislature to accomplish its purpose and determining whether the means selected fits that purpose and bears a *direct and substantial* relationship to it. *Cf. Faulkner v. Jones*, 10 F.3d 226, 230 (4th Cir.1993) ("A regulatory classification which is made for a purpose *unrelated* to the purpose of the regulation, or which is broader than that appropriate for the regulation, may reveal prejudice and define discrimination.").

There is ample support for directing the court's attention from a substantive equal protection analysis to a more procedural analysis. In *Craig v. Boren*, 429 U.S. 190, 199-200 (1976), the Court recognized, without a significant substantive evaluation, that the protection of public health and safety, which formed the basis for Oklahoma's statutes prohibiting the sale of "3.2% beer" to males under 21 and females under

18, "represents an important function of state and local governments." But the Court found the statute unconstitutional nevertheless because the classification by gender was not shown to serve a sufficient role in achieving the state's objective. Similarly in *Reed*, the Court agreed, again without any significant substantive evaluation, that establishing an efficient probate process was a legitimate governmental objective. But it nevertheless held that selecting males over females as administrators of wills was not a means that bore a direct and substantial relationship to the state's objective. *See* 404 U.S. at 76-77. *See also Orr v. Orr*, 440 U.S. 268, 280 (1979) (readily acknowledging as legitimate the state's purpose of providing assistance to needy spouses but finding unconstitutional the means that required husbands, but not wives, to pay alimony upon divorce).

Accordingly, under the intermediate level of scrutiny of a statute or program that classifies by gender, the analysis begins with the limited inquiry into whether the state objective is both consistent with a legitimate governmental role and important in serving that role. Thereafter it must shift to an inquiry of heightened scrutiny into whether the classification "substantially and directly furthers" that objective.

Application of this traditional test, however, to a case where the classification is not directed per se at men or women, but at homogeneity of gender, presents a unique problem, because once the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny. The second prong of the test thus would provide little or no scrutiny of

the effect of a classification directed at homogeneity of gender. Thus, in order to measure the legitimacy of a classification based on homogeneity of gender against the Equal Protection Clause, we conclude that we must take the additional step of carefully weighing the alternatives available to members of each gender denied benefits by the classification.

To achieve the equality of treatment demanded by the Equal Protection Clause, the alternatives left available to each gender by a classification based on a homogeneity of gender need not be the same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided by the state to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. We will call this third step an inquiry into the substantive comparability of the mutually exclusive programs provided to men and women.

Therefore, in this case we will examine a state-sponsored educational scheme offered by the Commonwealth of Virginia, under which the state provides a single-gender military-type college education to men and a single-gender college education with special leadership training to women, and determine (1) whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state. This is the

special intermediate scrutiny test that we shall apply in deciding this case.*

IV

Turning to Virginia's proposed VWIL program, we begin with the first part of the test and inquire into whether single-gender education constitutes a legitimate and important governmental objective, remembering that deference is to be accorded the state's legislative will so long as the purpose is not pernicious and does not violate traditional notions of the role of government.

The provision of education is considered one of the most important functions of state and local government. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152,

---

* The dissenting opinion has improperly characterized this test as one for "allowable *separate-but-equal* state-supported educational institutions." This misunderstands the standard we utilize.

As a general principle of equal protection jurisprudence, when there is no *meaningful and relevant* difference between two classes of persons for purposes of a given state regulation, equality is demanded, and "separate but equal" does not fulfill the demand. When there is a difference between two classes of persons, then separate and different facilities for each class may satisfy equal protection if the difference in facilities is sufficiently related to the nature of the difference between the classes.

In this case, we do not espouse a "separate-but-equal" test and never discuss "separate-but-equal facilities." Rather, the test we utilize would allow separate and *substantively comparable* facilities where a state justifies its offering of single gender education as a legitimate governmental objective.

158 (4th Cir.1992) ("Public education is recognized as one of the most important public services offered by state government."). State and local governments routinely commit large portions of limited tax dollars to education and mandate that, through a certain educational level, attendance at school is legally required. Moreover, discussions of economic competitiveness and the root causes of social disorder commonly end in a discussion about the importance of public education.

As important as education is thought to be to the welfare of the people, it is nevertheless not a *right* secured to the people by the Constitution, *see San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973), and following from that reality, a citizen does not, in the absence of legislative will, have a right to demand a publicly financed education. Moreover, it is not the province of the courts to create such rights in the name of guaranteeing equal protection of the laws. *Id.* at 33.

When a state chooses to support college education, it need not provide all types of education, all disciplines, all methods, or all courses. A state with limited resources might, for example, subsidize a medical school without similarly subsidizing a law school, and its selection from among many permissible beneficial programs does not in and of itself constitute "unequal protection." When a state narrows the range of its educational offerings, a narrowing of the class of those appropriately benefited is a necessary consequence. But a state may not establish a classification for admission, for example, to a medical school *unrelated* to its purpose of providing a medical education. Thus, we would expect judicial approval of an admissions classification based on

intellectual capability, but not on race or national origin. In a similar vein, if a state were to choose to subsidize a conservatory of music, sponsoring such a benefit might not fall beyond the range of what constitutes a legitimate and important state purpose. Yet those qualified to attend would naturally be a narrowly-drawn class of persons who qualified as the best musicians. Such a classification necessarily excludes most people, yet it is substantially related to the governmental objective. On the other hand, a classification for that conservatory defined by gender would probably not qualify as an appropriate classification.

Turning to this case, providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education. That single-gender education at the college level is beneficial to both sexes is a fact established in this case. *See United States v. Commonwealth of Virginia*, 766 F.Supp. 1407, 1411-12 (W.D.Va.1991). Indeed, the briefs submitted in this case by the parties and amici curiae list a multitude of professional articles describing the benefits of single-gender education, especially for late adolescents coming out of high school. This should not be surprising in light of common experience that a sex-neutral atmosphere can be less distracting to late adolescents in an educational setting where the focus is properly on matters other than relationships between the sexes. Moreover, it is not surprising that the public, increasingly seeking admission to single-gender colleges, finds this objective to be important. A recent edition of a national magazine, devoted to an annual collection of statistical data and ratings about colleges and universities, reports:

> After two decades as also-rans in higher education's rush to embrace coeducation, women's colleges are experiencing an unanticipated surge in enrollments and positive public attention.
>
> * * * * *
>
> While the disproportionate distinction achieved by women who are alumnae of single-sex institutions . . . is partially responsible for the enrollment boom, there are other explanations. Many attribute the newfound popularity to studies showing that girls in adolescence and beyond typically react to coeducational classrooms with "learned silence" and lowered aspirations. Others cite the diminished attraction of coeducation because of worrisome statistics on drinking and concerns about date rape and other violent crimes at institutions with both men and women, as well as the mounting criticism of large universities for seeming indifference to the quality of undergraduate education.

"A Burst of Popularity," *U.S. News & World Report*, Sept. 26, 1994.

Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many. Although there remains some disagreement among the experts about the extent of the benefits of single-gender education, it is not our role to resolve that issue. It is enough that there is a growing consensus in the professional community that a sexually homogeneous environment yields concrete educational benefits. Thus, we should defer to a state's selection of educational techniques when we

conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education. Accordingly, we conclude that Virginia has met the first part of our intermediate scrutiny test.

V

When applying the special intermediate scrutiny test for classifications based on homogeneity of gender in the context of higher education, we next consider whether that classification is substantially related to the state's purpose. When combined with the third part of the test, *i.e.*, the inquiry into whether excluded men and women have opportunities to obtain substantively comparable benefits, this inquiry scrutinizes the *means* by which the state chooses to obtain its objective.

Single-gender education provides an educational environment in which the student population is of one sex, providing the assumed benefit that those students are not distracted by the presence of the other sex. Even though it may be offered to both genders through separate institutions, separate campuses, or even separate classrooms, a single-gender educational program necessarily excludes members of the gender not included in *that* institution, campus, or classroom. The importance of the classification is not the fact that the student body is male or female, but that it is of the same gender, whichever is chosen for the particular program. But the only way to realize the benefits of homogeneity of gender is to limit admission to one gender. Thus, the means of classifying by gender are focused on the single-gender educational purpose as directly as the nature of the objective allows.

The classification for single-gender education at VMI is also directly related to achieving the results of an adversative method in a military environment. The adversative method was not designed to exclude women, but seized on the possibility, in a sexually homogeneous environment, of grating egos and setting the aggressiveness of one person against another through conflict, egalitarianism, lack of privacy, and stress—both physical and mental. The adversative method is intended to break down individualism and to instill the uniform values espoused by the institution. The methodology described, however, has never been tolerated in a sexually heterogeneous environment; indeed, we condemn it for good reason. If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

Accordingly, to preserve the benefits of single-gender education, which Virginia has chosen to attain through separate institutions, the programs at VMI and Mary Baldwin College would of necessity exclude persons of the opposite gender, men at Mary Baldwin College and women at VMI. No more direct means could be adopted to accomplish the state's objective of providing single-gender education at the institutional level. It is inherent in the benefit that men must be excluded from the women's program and women from the men's.

While we are satisfied that a classification for homogeneity of gender is necessary to provide single-gender education, at whatever level of separation, we must nevertheless, under the special intermediate scrutiny test that we are applying for such classifica-

tion, be satisfied that both excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to those they are denied. That brings us to the final inquiry of this intermediate scrutiny test.

VI

In determining the substantive comparability of benefits, we are faced with at least two questions: how are the benefits from which one gender is excluded to be defined, and on what level and to what degree must other benefits be comparable.

The United States notes that VMI affords a unique type of military training as part of its educational program which cannot be duplicated in another institution. Even though it acknowledges that a parallel program could theoretically satisfy the requirements of the Equal Protection Clause, the United States argues that any such program must be identical to that of VMI. Because that cannot be accomplished, it concludes that women could only enjoy the unique benefits of the VMI program if VMI admits women.

The failure of the government's syllogism, however, comes from its failing to follow its logic to completion. If we ordered VMI to admit women, the program would be irrevocably altered, forever denying its unique methodology to both women and men. Changes would have to be made to the adversative method, to the absence of privacy, and to the physical requirements of the program, all of which are part of VMI's unique methodology. Certainly military training could be provided for women at VMI, but it would be substantially different from the training VMI cadets currently receive and would be closer to the pro-

grams offered by the U.S. military academies, which are already open to women. Thus, neither gender would experience the unique type of adversative military training now utilized at VMI if VMI were to become coeducational.

Moreover, the government's argument that a comparable opportunity requires an identical program is not sustained by the Equal Protection Clause. The advocation that laws require equal methods and equal results for different classes of people can no more be supported than the suggestion that two programs for two different classes of people can ever be identical. *See Reed*, 404 U.S. at 75; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."). And the alternative of allowing a state to provide benefits only when they could be provided in identical form to all of its citizens, regardless of whether they are similarly circumstanced, is justified only by a needless, and indeed baseless, demand for conformity.

Thus, if the state desires to offer the benefits of single-gender education to its citizens, the state must mitigate the effects of the resulting gender classification by affording to both genders benefits comparable in substance, but not in form and detail.

VMI offers a publicly subsidized college education in a single-gender environment, resulting in a bachelor's degree and intended to produce disciplined men of honor who are well-suited for leadership. Its method involves the use of the traditional classroom in a pervasive military environment. The VWIL program at Mary Baldwin College would likewise intend to provide an educational opportunity in a single-

gender environment, leading to a bachelor's degree coupled with discrete training designed specifically to prepare women for leadership. In considering the level of detail for any comparison of the two programs, we must, to achieve a meaningful comparison of substance, do more than simply recognize that both programs provide higher education leading to an undergraduate degree. But we should not reject programs that are aimed at achieving similar results, not generally available from other institutions of higher learning, simply because they differ in approach. In this case, both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and the goals are the same. The mechanism for achieving the goals differ—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development—but the difference is attributable to a professional judgment of how best to provide the same opportunity.

To argue whether the adversative and pervasive military method applied to men at VMI should be applied to women at VWIL to reach better the goal of taught discipline and leadership in women makes for a rigorous debate among professional educators. The possibility of adapting the adversative methodology to women, setting woman against woman with the intended purpose of breaking individual spirit and instilling values, could succeed only if it is true that women, subjected to the same grating of mind and body, respond in the same way men do, and only

then if a sufficient number of women necessary to make such a program work desired to participate in the program. Educational experts for the Commonwealth testified that women may not respond similarly and that if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work. The United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard. But we need not resolve such details of methodology. This is the type of ongoing debate that is to be expected among *substantively comparable* institutions, and it reveals a vitality of professional concern which can lead to institutional betterment through adjustments down the road. In this case, the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution. Those differences that do exist do not require that the important state purpose of providing single-gender education for both sexes be defeated in this case.

It is true that VWIL is at its incipiency, and the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI. But such intangible benefits can never be created on command—they must be the byproduct of a longer-term effort. Moreover, to some extent, we compensate for this deficiency in the remedy section, below. For purposes of the Equal Protection Clause, however, we are satisfied that the programs to be offered at both institutions can be substantively comparable if VWIL

is undertaken with a persistently high level of commitment by Virginia and that men and women mutually excluded by the two programs will not be denied the opportunity for an undergraduate education with discipline and special training in leadership. It is noteworthy that men and women are not limited to the choices available at these two institutions. Virginia provides a much broader array of opportunities in higher education through other state supported colleges and universities, including the coeducational military program at Virginia Polytechnic Institute and State University. *See VMI I*, 976 F.2d at 893 n. 1 & 898 n. 8.

In this case, we conclude that if the conditions that we impose below are fulfilled, the opportunities that would be open both to men and women are sufficiently comparable. We therefore are satisfied that the special intermediate scrutiny test defined for this case has been met, insofar as a *proposed* program can meet this test, by the VWIL program proposed at Mary Baldwin College.

VII

Were Virginia now building its higher educational program from the ground up and, as part of it, offering bachelor's programs (1) at a male-only institution featuring a highly disciplined military environment, (2) at a female-only institution featuring a highly disciplined leadership program in a non-military environment, and (3) at a third institution offering a broad array of subjects and methods in a coeducational environment, our analysis would end here with approval of the program against an equal protection challenge.

In this case, however, there is an added element created by the *presence now* of VMI as an ongoing and successful institution with a long history and the *absence now* of a comparable single-gender women's institution. Virginia's proposal for Mary Baldwin College is just that—a proposal. Virginia has undertaken what appears to be a serious effort at developing a plan to meet this historic deficiency. Virginia appointed a task force of professionals to design a new program, designed a program aimed at special leadership for women, and funded the proposed program at the same per capita levels at which it funds VMI. In addition, governmental officials in Virginia seem to be supporting the new program at every level. In our earlier opinion we noted some ambivalence in that regard. Then-Governor Douglas Wilder had favored coeducation at VMI in the face of no other alternative, and state education officials favored a separate program, or some other course, leading the state, as a party, to bow out of the liability phase of the litigation as a house divided. Governor Wilder is now firmly behind the VWIL program as is current Governor George Allen. Moreover, the Virginia legislature has supported the program by providing what appears to be adequate funding and by promising to increase the level of funding, should the response require it.

Nevertheless, a state's response to a court ordered correction of a Fourteenth Amendment violation is given under command and therefore must be viewed with some skepticism. While the court was assured at oral argument that the program proposed at Mary Baldwin College was serious and had the full support of the state, the important question remains whether

Virgina will implement the program with the intensity and perserverance necessary to provide a substantively comparable opportunity for women, so that when VWIL is established we will not conclude that the value of the benefits provided by that program, when compared to VMI, tends "to lessen the dignity, respect, or societal regard" of women. To allay any skepticism and assure eradication of the constitutional violation, we therefore find it essential, during the early stage of VWIL's history, to be assured affirmatively that a high level of state support continues.

Accordingly, while we affirm the judgment of the district court, which has issued an injunction mandating implementation of the plan and retaining jurisdiction to oversee the implementation, we are remanding the case with instructions that the court include, as part of its oversight of the plan's implementation, a specific review to ensure that (1) the program is headed by a well-qualified, motivated administrator, attracted by a level of compensation suited for the position; (2) the program is well-promoted to potentially qualified candidates; (3) the program includes a commitment for adequate funding by the state for the near term; and (4) the program includes a mechanism for continuing review by qualified professional educators so that its elements may be adjusted as necessary to keep the program aimed not only at providing a quality bachelor's degree but also at affording the additional element of taught discipline and leadership training for women.

AFFIRMED AND REMANDED.

PHILLIPS, Senior Circuit Judge, dissenting:

In *VMI I*, 976 F.2d 890, we held unanimously that the Commonwealth of Virginia's official policy of allowing only men to be educated at state-supported Virginia Military Institute violated the Equal Protection Clause. Specifically, we held, applying intermediate level scrutiny under developed Equal Protection jurisprudence, that if, as the Commonwealth then asserted, the "important governmental objective" its policy served was the provision for its citizens of a diverse array of educational opportunities, including single-gender education, then providing one single-gender institution for men but none for women could not be deemed "substantially related to achievement" of that objective. *Id.* at 892, 899. Furthermore, we expressed doubt that the asserted diversity-of-educational-opportunities objective could stand scrutiny as the actual reason for maintaining VMI's male-only policy. *Id.* at 899 (pointing to lack of any state-announced policy of providing single-gender education as part of overall "diversity" goal; to the failure of the Commonwealth to defend the policy in this litigation; and to the fact that the actual policy being overwhelmingly followed by the Commonwealth's colleges and universities was coeducation rather than single-gender education).

In any event, whether because the asserted governmental objective of "diversity" was not a credible reason for the policy, or because, if it were, maintaining one male-only institution in the overall system could not be deemed substantially related to such an objective, we held the policy violative of equal protection guarantees. And, in keeping with established

judicial policy where comparable forms of systemic state action have been found violative of equal protection, *see, e.g., White v. Weiser*, 412 U.S. 783, 794-95 (1973) (electoral redistricting), we remanded with directions to allow the Commonwealth to make the first attempt at remedy. *VMI I*, 976 F.2d at 900. In doing so, we noted the two obvious remedies: admitting women to VMI (going co-ed) or foregoing further state support (going private). *Id.* Additionally—and I believe prudently, if with risk—we noted the possibility, without pre-judging the validity of any effort to realize it, of establishing "parallel institutions or programs." *Id.*

The Commonwealth opted for the "parallel program" possibility as an attempted remedy and submitted to the district court the proposed plan summarized in the majority opinion. Finding it adequate if properly implemented over time to satisfy equal protection guarantees, the district court adopted it in the form of an injunctive decree that directed compliance "with all deliberate speed." 852 F.Supp. 471, 485 (W.D.Va.1994). The panel majority has now affirmed the district court's decree and the critical findings and conclusions on which it is based.

With all respect, I would not do so. I do not believe the proposed remedial plan, whose judicial adoption in unrealized form obviously does not bring Virginia into present compliance with equal protection guarantees, has any real and effectively measurable capacity to do so over foreseeable time.

I therefore dissent. I would hold that the proposed remedial plan fails, as did the policy rejected in *VMI I*, to pass equal protection muster under the appropriate intermediate level of scrutiny. Accordingly, I

would reject the plan, declare the VMI men-only policy still in violation of the Equal Protection Clause, and order that the violation be ended either by abandoning the policy or by foregoing further state support for the institution.

I

Though the legal framework is well known and the general historical background of this litigation is not in dispute, a brief summary is needed to aid in identifying the exact constitutional issue that is now before us.

When Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it is inconceivable that any thought was given by the founders to the possibility that women should not be denied its intended benefits. No conscious governmental choice between alternatives therefore dictated the original men-only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, n. 10 (1982) (noting numerous examples from that era of "legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function"). Since that time and until this litigation (so far as anything before us reveals) no conscious governmental choice had ever been made by the Commonwealth of Virginia to reexamine that original policy. So far as can be told, the gender-role premises of its origins were those that continued over time to sustain it as official state policy.

It is clear then that it was this litigation that prompted the Commonwealth's first official re-examination of the policy and its underlying premises in light of the Fourteenth Amendment's requirement that the states provide the equal protection of their laws to all persons subject to them. That obligation, as imposed in 1868, has from earliest times been understood by the courts to expose gender-classifications to equal protection judicial scrutiny. Early on, that scrutiny was almost completely deferential to the legislative prerogative, asking only whether the classification served any reasonably conceivable, legitimate governmental purpose. *See, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall), 130, 141 (1872) (standard applied to uphold law prohibiting women from practicing law). Since 1976, however, the Supreme Court, confirming a trend toward some degree of heightened scrutiny that started in the early 1970's, *see, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (invalidating state law that preferred men over women as administrators of decedents' estates) has interpreted the Clause to require a significantly more stringent standard, "intermediate" between the "strict" scrutiny required for racial and other historically "suspect" classifications, and the most deferential "rational basis" scrutiny originally applied to gender-based classifications. As expressly adopted in *Craig v. Boren*, 429 U.S. 190 (1976), this intermediate level of scrutiny asks whether the state's gender-classification "serves important governmental objectives" and is "substantially related to achievement of those objectives," *id.* at 197. Under this standard, states seeking to uphold such classifications "carry the burden of showing an 'exceedingly persuasive justification' for [it]" by demonstrating both that the governmental objectives it asserts for the classification are "important" ones and that "the discriminatory means employed are substantially related to achievement of those objectives." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

It was this intermediate level of scrutiny that we applied in *VMI I* in holding the original male-only policy violative of equal protection. That holding still stands. Unless and until it is overruled, the original policy—which still remains in effect—remains unconstitutional. The district court's decision that we now review does not of course purport to hold otherwise. It assumes, as it must, the continuing unconstitutionality of *that* policy, but holds that the violation may be effectively remedied by the state's compliance with the injunctive decree entered by the court in adopting the state's proposed "parallel program" plan for women only at Mary Baldwin.

Several important things emerge from those developments. The first is that the remedial plan proposed by the Commonwealth and adopted as remedy by the district court simply involves a new gender-classification which now has become the proper subject of the heightened scrutiny mandated by *Craig* and its progeny. *Cf. White v. Weiser*, 412 U.S. 783, 795 (1973) (judicial review of remedial redistricting plan asks only whether plan meets constitutional requirements, not whether it provides best possible remedy for original violation).

The next point of importance is that this new gender-classification (in its projected form) is of a type that has not yet been definitively subjected to equal protection scrutiny: it involves a state's provi-

sion of separate single-gender educational institutions for men and women which it is claimed will meet equal protection requirements by providing substantially equal, though separately administered, benefits. This could raise a threshold question whether separate state-supported educational facilities for men and women, like those for white and black students, are so "inherently unequal," by reason of their stigmatic implications, *see Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), that the new classification violates equal protection *per se* and warrants no further scrutiny.

If the answer to that threshold question is, however, "no", so that intermediate scrutiny must proceed in detail, a final point of importance about the new classification must be faced. It is that one of the two critical elements in its separate-but-equal arrangement, the women-only program at Mary Baldwin, is only a plan and not a present reality. This creates a difficult problem for Equal Protection analysis. Must we assume, without question, that the stated goals of the women's program are actually achievable and that the fact of their achievement is subject to judicial verification when it occurs, so that we should, on that assumption, (though conditionally) assess the plan in its proposed ultimate form?[1] Or may we, in intermediate scrutiny, question either or both the

[1] The district court necessarily made that assumption. Implicit in its decision is the determination that (1) if the asserted objectives of the women-only program at Mary Baldwin are achieved, the result will be a separate-but-equal provision of benefits that passes equal protection muster and (2) achievement of the objectives is a realistic possibility capable of verification by the court when it occurs.

achievability of the program's stated objectives and the ability of the courts effectively to assess their achievement? If we undertake conditional assessment of the plan on the stated assumption, what is the proper equal protection test for allowable separate-but-equal state-supported educational institutions? What is the proper measure of equality for that purpose?

Each of these inescapable problems raises for us issues of first impression in application of equal protection jurisprudence to the resolution of this case.

II

The logical first question is whether separate single-gender undergraduate educational facilities for men and women are "inherently unequal" so that the proposed plan, even if perfectly realized in time, would be *per se* violative of equal protection. *Cf. id.* The question has not been addressed by the Supreme Court, *see Hogan*, 458 U.S. at 720 n. 1, or by this court, hence is an open one. Under the disposition I believe proper, it could remain open, for I would decline to address it, and hold that even if some separate-but-equal arrangement might pass equal protection muster, the one here proposed would not.[2]

[2] The United States has expressly disclaimed any contention that any and all forms of state-supported single-gender education are *per se* violative of equal protection. *See VMI I*, 976 F.2d at 898. This position would seem compelled by the Supreme Court's recognition in *Hogan* that a single-gender educational institution *might* be justified on the basis of need to compensate the favored gender for past discrimination. 458 U.S. at 727, 728. But that is a different issue than the issue whether the provision of allegedly separate-but-equal single-gender facilities for purposes other than compensation

III

This leads to the next question: whether the particular separate-but-equal arrangement proposed by the Commonwealth and adopted by the district court can survive intermediate equal protection scrutiny.

As earlier noted, the fact that the women-only component of this arrangement exists now only in plan form presents a difficult analytical problem: whether its consummation in fact should be assumed, with scrutiny then confined to the consummated overall plan, or whether the possibility of effective, judicially verifiable consummation of the plan may itself be questioned. Because I believe that even were the VWIL proposal to be substantially consummated in foreseeable time the resulting two-component arrangement would not pass equal protection muster, I would proceed on that assumption, though with some reservations to be expressed about the practical enforceability of the injunctive decree that embodies the proposal.

---

for past discrimination against one of the genders would violate equal protection *per se* because—as in matters of race—such separateness is "inherently unequal." The "question whether states can provide 'separate but equal' undergraduate institutions for males and females" was, in fact, expressly noted by the Supreme Court in *Hogan* as still an open one. *Hogan*, 458 U.S. at 720 n. 1. I do not therefore understand the United States' disclaimer to run as well to noncompensatory "separate but equal" arrangements, particularly in view of its suggestion of their necessary stigmatic implication. Appellant's Br. 20-22; Reply Br. 9, 10. For this reason, I do not think the issue whether non-compensatory "separate but equal" arrangements are *per se* violative can be avoided as waived, but, as indicated, would myself avoid it as unnecessary to decision in this case.

A

In its fully consummated form, the Commonwealth's proposed arrangement would consist of two separate single-gender undergraduate institutions, one for men only, the other for women only. The basic structure of each has been accurately summarized in the majority opinion and is not in dispute. A brief recapitulation of the core aspects suffices here.

The men-only component would be Virginia Military Institute, a justly famous and distinguished state-supported four-year liberal arts college organized and operated since 1839 in the classic "military school" model, featuring a student body now numbering around 1,300 men organized as a quasi-military "Corps of Cadets" and a distinctive "adversative" social and educational methodology designed to produce a distinctive type of "citizen-soldier" particularly suited for military and civic leadership.

The women-only component would be the Virginia Women's Institute for Leadership (VWIL) operated under contract with, and funded by, the Commonwealth of Virginia, as part of the undergraduate program at the otherwise privately-funded Mary Baldwin College. This "Institute," whose essential structure and stated mission are accurately summarized in the majority opinion, *ante* at 1233-35, would have come into existence in the Fall of 1995 at the earliest, around a century and a half after VMI's founding. While its future enrollment is necessarily uncertain, it would be expected to start up with about 25 to 30 students and expand as a concededly problematic demand for its highly specialized program allowed.

As indicated, for purposes of decision here, I would lay aside all concerns about whether the VWIL program would actually ever work out substantially as proposed, assume that it would be, and subject the resulting two-component arrangement to intermediate level equal protection scrutiny. That is, I would ask whether the resulting provision of separate state-supported men-only and women-only educational opportunities at VMI and VWIL respectively could meet that standard.

B

The first step in that process is to identify the precise governmental objective(s) the Commonwealth asserts to be the "important" one(s) justifying the proposed double gender-classification under which women will continue to be denied admission to VMI and men to VWIL. For in intermediate level scrutiny, unlike rational-basis scrutiny, we are limited to consideration of the objectives specifically advanced by the state, and may not look beyond those to any our imaginations might seize upon as justification. *See* L. Tribe, *American Constitutional Law*, § 16-32, pp. 1604-06 (2d ed.1988).

Though usually the governmental objectives relied upon to justify gender (and other) classifications are plainly enough articulated by their state defenders, that is not so true here. There is a real problem of identification in this case, for the Commonwealth seems uncertainly to advance a number as alternative or cumulative free-standing possibilities. Three might be identified: (1) providing separate single-gender educational facilities for both men and women because of the intrinsic value to some in both genders of such a social environment for education ("intrinsic value");[3] (2) producing both men and women particularly suited for leadership roles as "citizen-soldiers" by providing separate single-gender educational programs for each that are designed to accommodate their different psychological and emotional strengths and weaknesses in becoming effective leaders in either domain ("gender-adapted leadership training");[4] and (3) providing separate single-gender educational facilities for men and women as part of an overall objective of providing a diverse array of state-supported higher-education opportunities ("system-diversity").[5]

If these be, alternatively or together, the "governmental objectives" now asserted by the Commonwealth, we are entitled at the outset to inquire as to whether they are the "actual purposes," and to reject them if the record draws their reality as the true motivations for the policy sufficiently in doubt.[6] This was exactly what the Supreme Court did in rejecting the State of Mississippi's assertion in *Hogan* that its primary objective in maintaining its School of Nursing for women only was to compensate for past discrimination against them. Looking to the history of the School's founding and subsequent operation, to statistics respecting the actual dominance of women in the nursing profession throughout that history,

---

[3] Appellees' Br. at 4, 5.

[4] *Id.* at 2-4, 32-37.

[5] *Id.* at 14 & n. 5.

[6] Such an inquiry logically precedes inquiry into the "importance" of any objectives accepted as reflective of "actual purpose." *See Hogan*, 458 U.S. at 730. As to how the "importance" inquiry would work out in this case, *see infra*, at 1248 & n. 8.

and to state legislative history, the Court concluded that "although the state recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Hogan*, 458 U.S. at 730. The real purpose behind the original policy and its continuation through history was implicitly recognized by the *Hogan* court as being simply the carrying through of a "stereotyped view of nursing as an exclusively women's job." *Id.* at 729. *See also Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (noting that "the mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme").

I believe that a comparable inquiry here could properly support a like rejection of the various governmental objectives suggested by the Commonwealth —on the basis that they demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement. Such an inquiry—looking realistically to the historical record, taking judicial notice of much of relevance that is known to the whole world and of which we are not compelled to feign ignorance, *see Watts v. Indiana*, 338 U.S. 49, 52 (1948), and holding the Commonwealth to its appropriate stringent burden of justification, *see Hogan*, 458 U.S. at 724 (must be "exceedingly persuasive") would, I believe, reveal a quite different *actual* purpose. Specifically, I think it would support a confident and fair conclusion that the primary, overriding purpose is not to create a new type of educational opportunity for women, nor

to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system—though all of these might result serendipitously from the arrangement—but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties.[7]

---

[7] As the record indicates, and as it is well to recall at this stage of the litigation, the Commonwealth of Virginia did not officially defend the original VMI men-only policy that we held to be unconstitutional in *VMI I*. The justification for that policy advanced in *VMI I* was exclusively shaped and actively conducted by VMI, its official governing board, that board's members and (as intervenors) VMI alumni organizations. *See VMI I*, 976 F.2d at 894 & n. 3. The justification then advanced by those parties is fairly and simply summarized:

> VMI's distinctive educational program, featuring rigorous military discipline and an "adversative" methodology, is suitable only for men and not for women, to the point that the admission of any women into it would effectively destroy it; the demonstrated value to society of that program and those it has produced is too important to allow it to be destroyed in that way.

See VMI I, 976 F.2d at 896-97.

That justification and the perception underlying it has not been abandoned by those who advanced it. They continue to press it by "protective" cross-appeal on this appeal after having sought to challenge its rejection in the Supreme Court.

Taking judicial notice of matters surely of common knowledge in the Commonwealth, I would be prepared to conclude that (1) the perception underlying the policy justification advanced by VMI officials and alumni organizations remains alive and strongly held by those parties, and that (2) the

To reach such a conclusion would no more question the good faith of the Commonwealth in advancing these claimed governmental objectives in this litigation than did the Supreme Court's rejection of the objectives advanced by Mississippi in the *Hogan* litigation. It would simply involve the same realistic recognition that the objectives advanced represent after-the-fact rationalizations that, quite understandably, may be advanced by any state required in litigation to justify a gender-classification whose seeds were planted long before equal protection jurisprudence had come into being or had evolved to the point of drawing it in question. *Cf. Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result) (urging analysis of mandatory pregnancy leave policy under equal protection doctrine, and rejecting under such an analysis "most of the after-the-fact rationalizations proposed by the [state agency defendant]" as "unsupported by the record").

A conclusion that the actual, overriding purpose of the proposed separate-but-equal arrangement remains the preservation by that means of the original 1839 policy of excluding women from VMI, a policy that unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and

---

prestige and influence of VMI and its justly loyal alumni and their organization in influencing any political decision affecting VMI's interests is sufficiently powerful to ensure that their overriding purpose in this matter effectively defines the actual governmental objective of the Commonwealth's proposed remedial plan. That overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely secondary means to that end.

capabilities of women in society, would of course require declaring the proposed arrangement violative of equal protection without further inquiry into specifics. *See Hogan*, 458 U.S. at 729, 730.

Although, as indicated, I believe a decision on that ground would be proper, I would not decide the case on that basis alone, or even primarily. There are unique circumstances here that were not present in *Hogan* or in any other case of which I am aware in which a state's asserted objectives have been rejected at the threshold as demonstrably not the "actual purpose" of a challenged gender-classification. Uniquely, the gender-classification under specific challenge here is one now defended by the Commonwealth as a proposed judicially required remedy for a so-far unsuccessfully defended prior gender-classification. The real position of those who defended the original policy remains that the Commonwealth should not have been required to undertake any remedial action, hence that it need have no justifying objectives for the new remedial gender-classification it proposes. *See supra*, note 7. Though the Commonwealth does not press the point, I think it fair to recognize that in these circumstances, unlike those where the gender-classification being defended is one prompted entirely by voluntary state action, courts should be especially cautious about rejecting as not "actual" the objectives advanced for involuntarily undertaken remedial action. Accordingly, though I believe the Commonwealth must defend its remedial plan under the usual intermediate scrutiny standard, I think it is entitled to have its proposed separate-but-equal gender-classification assessed for the substantiality of its "fit" to the remedial objectives it now asserts.

C

Assuming then for purposes of this case that the governmental objectives earlier identified should be accepted as reflective of the "actual purposes" of the proposed plan despite my stated doubts about their reality as other than compelled remedial rationalizations, the next question is whether they have also been shown to be "important" and not merely "rational." Here again, because of the conceptual difficulties presented by the remedial context of the case, I would assume *arguendo*[8] the importance of the governmental objectives asserted by the Commonwealth and proceed to the second inquiry under the proper equal protection test: whether the Commonwealth has made an "exceedingly persuasive" showing that the gender-classification central to its proposed separate-but-equal arrangement is "substantially and directly related to its proposed [remedial] objectives." *Hogan*, 458 U.S. at 724, 730. I would

---

[8] I make the assumption *arguendo* because resolution of the special conceptual problems respecting remedial objectives in intermediate-level scrutiny that would be required is not necessary to the decision I would reach. In making the assumption, I note, with all respect, that I do not agree with the majority's assertion that when we do assess "importance" we owe great deference to legislative judgments on the matter. I believe instead that in intermediate scrutiny the state's burden of showing the "importance" of asserted objectives is, as with all aspects of its justification defense, a difficult one that provokes non-deferential judicial balancing of the objectives asserted against affected private interests. *See, e.g., Craig*, 429 U.S. 190, 196 (1976) (asserted governmental objective of administrative convenience not sufficiently "important" to justify gender-classification being challenged; no deference accorded legislative judgment).

hold not, as the primary ground for decision that the proposed plan does not pass constitutional muster.

What is the "substantial and direct relationship" —the "fit"—between means and asserted ends for which we search in intermediate scrutiny, and how do we look for it—in general, and particularly in this case? The general question whether a challenged classification "is *substantially* related to its asserted goals" has been characterized as "at best an opaque one." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 474, n. 10 (1981) (plurality opinion) (emphasis in original). Though as this rightly observes, the substantive inquiry is likely to be difficult, two critical aspects of the inquiry process are plain enough.

1. The inquiry is one of law—of constitutional law—so that review of a lower court's determination of the issue, (though not of any underlying factual predicates) is plenary. *See, e.g., Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150-52 (1980) (plenary review of State Supreme Court holding).

2. The requirement that the relationship between discriminatory means and asserted goals be "substantial and direct," rather than merely "rational for any conceivable purpose," mandates an inquiry into available alternatives, including gender-neutral ones. This is not to determine whether the fit is the best one possible, but to ensure that the means chosen did not by-pass reasonably available alternatives less discriminatory or not at all discriminatory in their impact on the disfavored gender. *See, e.g., Wengler*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 283 (1979).

The specific issue thus becomes whether the Commonwealth has sufficiently shown within these prin-

ciples, that its proposed separate single-gender school arrangement is directly and substantially related to the achievement of the three governmental objectives earlier identified in short-form as the "intrinsic value," "gender-adapted leadership training," and "system-diversity" objectives. *Supra* at [40a-41a].

As earlier indicated, the question of the fitness of any such separate single-gender school arrangement to achieve any governmental objective apparently is one of first impression in contemporary equal protection jurisprudence. One aspect of the matter, however, seems clear at the outset to me: no such arrangement could be found *substantially* related to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantially* equal across the board of the relevant criteria for evaluating educational institutions. The Supreme Court's reference, in *dicta*, to the possibility of such an arrangement in *Hogan* seems to assume such an equality of benefits as a given, *see Hogan*, 458 U.S. at 720 n. 1, and I do not see how it could be otherwise under contemporary equal protection jurisprudence. Certainly, when separate-but-equal educational arrangements for the races were considered to be tolerable under the Equal Protection Clause, a basic prerequisite was that they be truly, *substantially* equal in all the relevant criteria, tangible and intangible, by which educational institutions are evaluated. *See e.g., Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (requiring "substantial equality in educational opportunities" to justify separate state-supported law schools for white and black students, and not finding it upon considering both tangible resources such as "scope of library" and intangible resources such as "position and influence of the alumni," "traditions and prestige").

Though race is a "suspect" classification and gender so far is not, I see no reason why the same requirement of *substantial* equality of benefits that was thought at one time to justify separate-but-equal schools for the different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit separate-but-equal arrangements. If that be so, then no governmental objective whose achievement is specifically dependent upon the utilization of separate single-gender institutions to distribute educational benefits could possibly justify a significant discrimination between the two in terms of the basic content, or quality, or quantity of those benefits—tangible and intangible. Thus, I would think a state could not justify under intermediate scrutiny the provision of a men-only engineering school and a women-only nursing school as a means of achieving such asserted objectives as system-diversity, or the intrinsic value to some in each gender of single-gender educational environments, or the like. Neither could it justify the provision of separate graduate or undergraduate institutions having comparable educational programs and missions, but also having wide disparities favoring one gender over the other in matters of physical plant, annual funding, faculty or like commonly understood measures of value.

Does this mean that there is no way that a state constitutionally could set about achieving such governmental objectives through the provision of separate single-gender institutions? I think it does not necessarily mean that, but the arguably acceptable means would seem to me to be very narrowly circumscribed.

If we looked for the arrangement most likely to survive scrutiny, it presumably would involve simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extracurricular programs, funding, physical plant, administration and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as tradition, prestige and alumni influence—as to which each starts with none. Nor could there be any stigmatic implications arising from the substantially comparable content of its educational program. If any arrangement involving separate-but-equal single-gender institutions set in place to achieve governmental objectives of system-diversity, or of accommodating valid preferences in each gender for a single-gender educational environment, could survive equal protection scrutiny, it surely would be one such as that posited.

Taking it as the paradigm against which to measure the proposed arrangement reveals how far short the proposed plan falls from providing substantially equal tangible and intangible educational benefits to men and women. Without denigrating in any way the proposed VWIL program, not certainly Mary Baldwin, the contrast between the two on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria. Particularly is this obvious with respect to the intangibles such as prestige, tradition and alumni influence which the Supreme

Court, looking for substantial equality of educational opportunities in *Sweatt*, thought "more important" even than tangible resources. 339 U.S. at 634. The student and eventual graduate of VWIL will not be able to call on the prestigious name of "VMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal.

The district court and the majority apparently seek to avoid the insurmountable problem of finding substantial equality of benefits by narrowly defining the relevant range of those to be considered. If inquiry is confined only to those benefits sought by those relatively few women who are expected to self-select VWIL primarily for its single-gender environment, it becomes very easy to ascribe not only substantial equality, but superiority, to the benefits available at VWIL. But that, of course, won't do. The proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice. As was said in *Sweatt*, "[i]t is difficult to believe that one who had a free choice between [these] schools would consider the question close." *Id.*

The implication of all this is, as I realize, a stark one. No separate single-gender arrangement that involved VMI as the all-men's school and any newly-founded *separate* institution (whether free-standing or an appendage) as the all womens' component could

pass equal protection muster. It could not provide substantially equal educational benefits or opportunities to both genders.

This may be most obvious when the proposed arrangement is tested for fit against the "system-diversity" and "intrinsic value" objectives. The "gender-adopted leadership training" objective poses a slightly different problem. The benefit upon which it concentrates is a projected *outcome*: that of being one especially suited for military and civilian leadership by virtue of training adapted to different gender-characteristics, as "citizen-soldier."

As to this particular objective, I will close by noting a process reservation beyond the substantive concerns for achieving substantial equality of the outcome goal. It seems to me too amorphous an objective to permit any principled judicial assessment as the VWIL program is expected to evolve. When can it first be assessed? Surely not earlier than the four years it will take to produce the first graduate presumably trained for that special leadership role. Must it not actually await an additional period for putting the training to test in the military and civilian domains? How will it be assessed even then: by comparing, on a proportional basis, the actual leadership positions achieved by graduates of the two schools? My pessimistic assessment is that one of two things will occur. One, this particular governmental objective—actually a critical one as advanced—will simply be allowed to fall out of sight in the judicial monitoring of results that is projected. Two, its attempted monitoring will generate an absolute quagmire of conflicting contentions about achievement of the objective.

It will not work.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civ. A. No. 90-0126-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

COMMONWEALTH OF VIRGINIA, ET AL., DEFENDANTS

Apr. 29, 1994

MEMORANDUM OPINION [1]

KISER, Chief Judge.

This phase of this case ("Remedy") is on remand from the Fourth Circuit. Although the Fourth Circuit agreed that single-sex education was a legitimate pedagogical goal, it criticized the Commonwealth's avowed policy of supporting diversity in higher education through VMI in two respects: First, that there had been no authoritative articulation that the Commonwealth sought to diversify its higher education

[1] Additional findings of fact are set forth in the Appendix to this Memorandum Opinion.

system by offering single-sex education; and, second, that the program—as it now stands—is one-sided, i.e. that VMI offers a single-sex opportunity to young men while there is no comparable opportunity for young women. For these reasons, this case was remanded to this Court to permit the Commonwealth to ". . . formulate, adopt and implement a plan that conforms to the principles of equal protection. . . ." *United States v. Commonwealth of Virginia*, 976 F.2d 890, 892 (4th Cir.1992) (*"VMI"*).

There is substantial disagreement between the parties as to what is required by the remanding instructions of the Fourth Circuit and the Equal Protection Clause. It is the position of the United States that the mandate from the Fourth Circuit and the Equal Protection Clause require that if the Commonwealth opts to establish a separate program for young women, it must be in all respects equivalent to, i.e. a mirror image of, the VMI program.[2] The Commonwealth argues that the United States' position mis-

[2] The United States continues to maintain that the only action by the Commonwealth which will comport with the Equal Protection Clause is to admit women to VMI. This was the remedy the United States sought in its Complaint, and it has never wavered from it. The United States called the Court's attention to the recent decision in *J.E.B. v. Alabama*, —— U.S. ——, 114 S.Ct. 1419, —— L.Ed.2d —— (1994). This case does not change the equal protection jurisprudence applicable to the intermediate scrutiny test as applied to sex-based classifications. The Court, in its plurality opinion, reaffirmed the test as set forth in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The Court found the respondent had failed to meet the first prong of the test, i.e., that sex-based peremptory challenges are not an important governmental objective.

construes both the meaning of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause. The Commonwealth's position is that the mandate of the Fourth Circuit requires Virginia to provide a state-supported all-female college program that will attain an outcome for women that is comparable to that received by young men upon graduation from VMI. The Commonwealth argues that to attain the desired outcome for women, the Fourth Circuit's mandate does not require that an all-female program adopt the same or similar methodology as is used at VMI. The Commonwealth further argues that its view comports with the judicial gloss given, in this context, to the Equal Protection Clause—i.e. that the Commonwealth's system of higher education now satisfies intermediate scrutiny equal protection analysis applicable to sex-based discrimination.

If the United States' position is the correct one, then the Commonwealth's proposed Plan must fail because the Plan differs substantially from the VMI program. If the Commonwealth's position is the correct one, however, then an analysis of its proposed plan is necessary to determine whether it meets both the requirements of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause. I am persuaded that the Commonwealth's position is the correct one and that its proposed plan meets the requirements of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause. Here is why.

Procedural Background

At the outset of this phase of the litigation, this Court ruled that factual findings, which were made by this court in the liability phase and approved by

the Fourth Circuit, would not be open for reexamination. A full recitation of those facts is found in this Court's opinion at 766 F.Supp. 1407. A brief recitation of the operative findings made there will be sufficient for the present purposes.

District Court Opinion

After reviewing the legal principles that apply to intermediate scrutiny under the Equal Protection Clause, I reviewed the expert testimony pertaining to the benefits of a single-sex education and concluded that "viewed in the light of this very substantial authority favoring single-sex education, the VMI board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's method of teaching and training." *Id.* at 1412. After making that finding, I then reviewed the effect that the admission of women to VMI would have on its program and concluded "the single-sex status would be lost and some aspects of the distinctive method would be altered if it were to admit women." *Id.* at 1413. Finally, I observed that there was an absence of a comparable opportunity for women, but concluded that this did not impair the legitimacy of the VMI program, and I did not seek to impose corrective action upon the Commonwealth because "the relief that the United States seeks in this suit is to require VMI to open its doors to women—not to force Virginia to establish an all-female, state supported college." *Id.* at 1414.

Fourth Circuit Opinion

At the outset of its opinion, the Fourth Circuit stated,

> [W]e accept the district court's factual determination that VMI's unique methodology justifies a single-sex policy and material aspects of its essentially holistic system would be substantially changed by coeducation. . . . The Commonwealth of Virginia has not, however, advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women.

p. 892.

The court stated that it was remanding the case "to the district court to require the Commonwealth of Virginia to formulate, adopt, and implement a plan that conforms to the principles of equal protection discussed herein." *Id.* at 892. The court then proceeded with its analysis. After reviewing this Court's finding with regard to the benefits of single-sex education in general—and VMI methodology in particular —and after reviewing the pertinent jurisprudence with regard to the proper application of equal protection under the intermediate scrutiny test, the court concluded, "In summary, the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." *Id.* at 898.

The appeals court proceeded to criticize the Commonwealth for failing to articulate, authoritatively and comprehensively, a policy with regard to single-sex education which would include both males and females. In summation, the Court stated:

> We are thus left with three conclusions: (1) single-sex education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women.

Id. at 899.

Because of these deficiencies, the Fourth Circuit remanded the case to this Court to give the Commonwealth an opportunity to fashion a remedy that would address the constitutional violation identified by the Court. In so doing, the Court instructed:

> [W]e do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter. Rather, we remand the case to the district court to give the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and to adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine,

> there might be other more creative options or combinations."

Id. at 900.

Interpreting the Fourth Circuit's Opinion

The overarching question in this phase of the litigation is: what does the Fourth Circuit's opinion require of a proposed plan in order to pass constitutional muster? As stated above, the litigants disagree strongly on this issue. Both sides are able to support their arguments by fragmented readings of the Fourth Circuit's opinion. For example, the United States finds support in the statement "whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity. . . ." *VMI*, 976 F.2d at 898. This statement would imply that a program for women must provide a VMI-type education. The United States urges that to comply with the instructions of the Fourth Circuit, the Commonwealth is required to produce a plan that will create a separate institution which closely resembles, if not clones, the physical plant, the curriculum, the methodology, the prestige, and many of the other attributes of VMI. In other words, the United States reads the Fourth Circuit opinion to require a "separate but equal" institution.[3]

The sophistry of the "separate but equal" concept was roundly rejected in *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). *Sweatt* involved an equal protection challenge to the admissions policy at the University of Texas law school

[3] The United States does not use the phrase "separate but equal" but that is the import of its argument.

which categorically denied admission to blacks. Texas offered a newly established all-negro law school which it claimed remedied any constitutional violation which may have existed by virtue of UT's law school admissions policy. Although *Sweatt* was a racial discrimination case that applied strict scrutiny equal protection analysis, the rationale of the case applies to this case. The *Sweatt* Court, after reviewing the tangible qualities which made the University of Texas superior to the proposed new law school for negroes, stated:

> What is more important, the University of Texas law school possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

Id. at 634, 70 S.Ct at 850.

Thus, if "separate but equal" is the standard by which the Commonwealth's plan must be measured, then it surely must fail because, as the United States pointed out time and time again during the trial, even if all else were equal between VMI and the Virginia Women's Institute for Leadership [4] ("VWIL"), the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years. One must

[4] This is the title assigned to the Commonwealth's Proposed Remedial Plan.

assume that the Fourth Circuit did not assign the Commonwealth an impossible task when it suggested that the Commonwealth was free to establish "parallel programs" or to devise "creative options or combinations" that would comply with the court's decision. It would be unrealistic to think that the Fourth Circuit was requiring an exercise in futility.

Moreover, the Fourth Circuit's opinion must be read in light of the portions of the district court findings, which the appeals court approved. The district court found VMI's male-only admission policy was justified without regard to VMI's unique methods of teaching and training. The Fourth Circuit's opinion approved specifically the district court findings in this respect when it stated, "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." *Id.* at 898. Thus, both the district court and the appeals court held that the legal justification for VMI's all-male admission policy was contained in the benefits that flow from a single-sex education. The finding that VMI employed unique methods to teach young men was simply an added dimension to the already pedagogically justifiable policy.

The Fourth Circuit's subsequent decision in *Faulkner v. Jones*, 10 F.3d 226 (4th Cir.1993), further bears out this interpretation of its mandate in this case. In amplifying its decision in the VMI case, the *Faulkner* court stated,

> We remanded the case to the district court with instructions to elicit a plan from the state complying with the Fourteenth Amendment. We allowed for the possibility that a plan could still

permit VMI to remain a state-supported, single-sex institution, if that were the will of Virginia, so long as women were offered a parallel program. (citations omitted). The order in VMI did not, however, direct that any parallel program which the state might choose to provide be identical for both men and women.

* * * *

[A]ny analysis of [a parallel program] in response to a justified purpose must take into account the nature of the difference on which the separation is based, the relevant benefits to the needs of each gender, the demand (both in terms of quality and quantity), and any other relevant factor. In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.

Id. at 232.

I now examine the Commonwealth's Proposed Remedial Plan to determine whether it comports with the controlling legal principles framed by the Fourth Circuit's remand.

Virginia Women's Institute for Leadership

The Virginia Women's Institute for Leadership ("VWIL") plan envisions a parallel program, which takes into account the differences and the needs of college-age men and women. The VWIL plan offers a holistic, residential four-year college experience in

an established all-female environment, Mary Baldwin College (MBC). VWIL's stated mission is to produce the "citizen soldier," i.e., women who are trained for leadership in both civilian and military life. Defs.' Ex. 11 at 6. The methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women.

The Dean of Mary Baldwin College ("MBC"), Dr. James D. Lott, chairs a Task Force which was charged with developing a leadership program suitable for an all-female four-year college. Dr. Lott is an expert in the field of educating women at the college level, as were most of the members of the Task Force who were drawn from the staff and faculty at MBC. Besides drawing on their own experience and expertise, the Task Force made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women. The Task Force also consulted outside experts, the most notable of which was Dr. Richard C. Richardson, Jr. After a detailed study of the appropriate methods by which the leadership program should be structured, the Task Force determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles. Consequently, the Task Force developed an analogy to the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life. *See* Defs.' Exs. 11, 39.

In lieu of the adversative methods employed by VMI, the VWIL concept proposes a cooperative

method which reinforces self-esteem rather than the leveling process used by VMI. VWIL will be a highly structured program but without the extreme adversative VMI components, such as the rat line and breakout. In the opinion of one of the leading experts on the educating of women, Dr. Elizabeth Fox-Genovese, an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive. Dr. Fox-Genovese's opinion is based on her extensive research which shows that most women reaching college generally have less confidence than men. It is the opinion of the Task Force that the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men. Dr. Fox-Genovese concurs in this assessment. Tr. 247-48 (Fox-Genovese).

In addition to its argument that the VWIL program is not sufficiently similar to the VMI methods to pass constitutional muster, the United States argues that the VWIL program will not attain its stated goals and that the financial planning is fatally flawed. I will address these objections in turn.

A. Differences between VWIL and VMI.

1. *Academic offerings and requirements of VWIL*

The general education requirements and the academic majors, as well as the admission standards, for VWIL students will be the same as those for regular MBC students. Plan at 8. VWIL students must complete a calculus course, either a statistics course or "an appropriate discipline-based quantitative methods course, two science courses with labs, in addition to

Biology of Women, and a microcomputer applications course "or the equivalent or by passing a competency test." Defs.' Ex. 39 at 6. VWIL students will take a leadership externship. According to the plan, this externship, "which should ideally be related to [the student's] major," will be distinguished from other externships by providing an opportunity to experience and reflect on leadership in practice. VWIL students will participate in the VWIL seminar, and in Saturday seminars three times a semester. Defs.' Ex. 39 at 8, 15. VWIL students will organize a Leadership Speaker Series for one semester of the junior year and one semester of the senior year. Defs.' Ex. 39 at 15. VWIL students will not attend any classes with male students. Tr. 101, 155 (Lott).

At trial, the government spotlighted the fact that VWIL students will have the opportunity to earn an engineering degree only if they participate in a 3-2 program with Washington University. According to the government this arrangement is constitutionally unacceptable given that VMI offers an engineering degree as well as several advanced math and physics courses that VWIL will not offer. Defendants explained however, that demand at present would not justify an engineering program at MBC. The Fourth Circuit, while amplifying its *VMI* decision in *Faulkner* stated explicitly that one of the factors to be considered by this Court in evaluating any proposed remedy is the demand for aspects of a particular program. *Faulkner*, 10 F.3d at 232. The compelling evidence is that there would be a very slight demand for an engineering program at the all female VWIL. Again, simply because a small handful of women may desire a mirror image VMI, or even an engineering

program in an all female environment, does not mean that the Commonwealth is constitutionally obliged to provide such. The Commonwealth has finite resources and it must identify demand for the various alternatives in higher education in the Commonwealth and allocate its resources accordingly.

The very concept of diversity precludes the Commonwealth from offering an identical curriculum at each of its colleges. Thus, in many instances, a prospective student must make a choice between the lifestyle of a college and a preferred course of study. For example, a prospective student may prefer the lifestyle at William and Mary in the eastern part of the state, but wants to study veterinary medicine which is offered only at VPI in the western part of the state. Here, a prospective VWIL student is faced with a similar choice—to go to VPI, a co-ed college which offers an engineering course and has an ROTC component, or to attend VWIL, which is all female, has an ROTC component but no on-campus engineering program. Each of Virginia's colleges cannot be all things to all people. Financial resources do not permit it nor does equal protection require it.

2. *VWIL/MBC Residence Life*

The residential life for VWIL students will vary significantly from the residential life of VMI students. The Task Force developed a model which will allow VWIL students to move in productive ways between the "walls" of VWIL and the MBC community. Defs.' Ex. 39 at 11-12. Upperclass VWIL students will be required to live for at least one year in the VWIL House. Defs.' Ex. 39 at 14-15. The VWIL House will not be operated on a military format. Defs.' Ex. 11 at 11; Tr. 374 (Tyson). The Task Force rejected VMI's extreme adversative model for the co-curriculum component because that model would not produce the same outcomes for the VWIL population as it does for the VMI population. Notwithstanding these differences, the VWIL program will use the highly disciplined schedule of the VMI model. Defs.' Ex. 39 at 12-14.

3. *The Military Component*

VWIL requires participation in an ROTC program. The United States argues that the VWIL ROTC component is a pale image of the military lifestyle at VMI, but in making the argument the United States confuses VMI's co-curricular military model of training with its ROTC program.

The only expert to testify on the effectiveness of ROTC programs was Major General Robert E. Wagner. He is a person who has devoted a substantial portion of his career to establishing, evaluating and standardizing ROTC programs in colleges throughout the United States. He compared outcomes of ROTC programs of co-ed colleges which had no military co-curricular lifestyle with the cadets from VMI who participated in ROTC and found no significant difference in the performance of VMI cadets and participants from co-ed colleges. For example, he found that the ROTC participants from the University of Virginia fared as well, and in some cases better, than VMI cadets.

4. *VWIL's Benefits/Outcomes*

VWIL is a good design for producing female citizen-soldiers and will be unique in the country. Tr.

249-50 (Fox-Genovese). The VWIL experience will not be the entirely militaristic experience of VMI. Instead, VWIL, because it is planned for women who do not necessarily expect to pursue military careers, incorporates the element of public service. *Id.* Although the United States showed unequivocally that the VWIL program differed from VMI in many ways, no expert for the United States testified that VWIL would not be educationally beneficial for women.

Defendants' witnesses, Dr. Richardson and Mr. Bunting, and United States witnesses, Drs. Conrad and Astin, agree that any given set of outcomes can be obtained by more than a single methodology. Tr. 608 (Richardson); Tr. 1550 (Bunting); Tr. 1076 (Conrad); Tr. 1302 (Astin). VWIL is a pioneering project. As such it cannot, by definition, boast of a VMI type record of producing "citizen soldiers." However, the evidence produced at trial indicates that MBC is committed to providing to the VWIL women benefits that are equal to or better than the benefits provided to men at VMI. As noted *supra*, MBC, with its experience in women's education and record of unique programs, believes that VWIL will accomplish its mission. Tr. 1529-30 (Tyson).

The government stressed the fact that the Commonwealth has not yet developed a firm methodology for evaluating the VWIL program and argues, therefore, the credibility of the plan is fatally undermined. The expert testimony at trial differed significantly in assessing the expected outcomes of the VWIL program. Perhaps the only conclusion that may fairly be drawn from the testimony in this regard is that attempting to evaluate the VWIL program before it is implemented is of questionable value. According to Dr.

Askegaard, evaluating a program is a retrospective exercise and terms like "citizen-soldier" must be operationalized before a program can be evaluated. Because the term "citizen-soldier" has not been operationalized, an assessment plan has not been developed.

Dr. Clifton Conrad, one of the government's experts on curricular and co-curricular education programs, testified that (1) many different means can be used to achieve the VMI outcomes, Tr. 1103-04 (Conrad), (2) his opinions regarding VWIL are informed guesses, and (3) he cannot evaluate the program until it has been implemented. Tr. 1260 (Astin).[5]

The government also offered testimony of Dr. Alexander Astin. Dr. Astin testified that the success of the VWIL program will depend upon who is attracted to the program and who forms the peer group and how the implementation of the program deals with the dilemma of what will be different and unique from the traditional MBC program. Because of these considerations, Dr. Astin concludes it will be difficult to realize VWIL's objectives. Tr. 1260 (Astin).

---

[5] Dr. Conrad was asked by the Justice Department to analyze whether VWIL will provide to women benefits comparable to those provided to men at VMI. Tr. 1041 (Conrad). With respect to the components of the VWIL program, Dr. Conrad testified only that each is not "fully comparable" to VMI. Tr. 1047-51, 1061, 1063, 1067 (Conrad). Dr. Conrad testified that VMI and VWIL are not comparable in that there are differences. Dr. Conrad stated that he did not think that one program is better than the other. Further, Dr. Conrad testified on cross-examination that he does not consider himself an expert in single-sex education. He has not studied whether single-sex programs for women are different from single-sex programs for men. Tr. 1090-91 (Conrad).

Dr. Astin testified that the only way to know if VWIL can accomplish its outcomes is to implement VWIL and assess its outcomes. Tr. 1273 (Astin).[6] Dr. Astin conceded that, even if the Commonwealth of Virginia were to create the mirror image of VMI for women, it could not duplicate the alumni network, history, tradition and prestige of VMI. Tr. 1277 (Astin).[7] Finally, Dr. Astin testified, as did Dr. Conrad, that it is possible to achieve a similar educational outcome through different educational methodologies. Tr. 1302 (Astin). Dr. Astin further testified that his conclusions regarding VWIL's future outcome are speculative, Tr. 1287 (Astin), and that educators could reasonably disagree with his conclusion that the VWIL program will not be able to achieve its stated goals. Tr. 1305 (Astin).

Dr. Astin's personal ethical opposition to VMI's current all-male admissions policy impairs his objectivity in evaluating the VWIL program. Indeed, Dr. Astin has admitted that he has "a problem with any institution that excludes applicants on the basis of race or sex," that his "sense of equity and desire for the elimination of sexism and racism conflicts with [his] interest in supporting the most effective

---

[6] Dr. Astin testified that the peer group is the key factor in any undergraduate student's development. Dr. Astin opined that the peer group in the VWIL program will differ radically from that at VMI and therefore the benefits will not be comparable. Tr. 1219-21 (Astin). However, Dr. Astin testified that he does not know what type of peer group will be in the VWIL program. Tr. 1272 (Astin).

[7] Dr. Astin acknowledged that he has made no study of the outcomes of VMI or of MBC. Tr. 1306-07 (Astin). He has not determined what would be required in the VWIL program to achieve VMI outcomes. Tr. 1289 (Astin).

forms of education," and that "some compromise in the quality of education is the price we must pay if we are to achieve fairness and equity." Defs.' Ex. 95. Dr. Astin's opposition to VMI's admission policy seems to be somewhat at odds with his flagship publication, *Four Critical Years*, wherein he extolled the virtues of single-sex education at the college level. The conflict arises from his present personal viewpoint on excluding females from publicly-supported colleges. Indeed, Dr. Astin has stated that because of this strong personal opinion, he would be willing to sacrifice beneficial pedagogical methods which infringe on his view. Defs.' Ex. 95. If I comprehend Dr. Astin's distinction correctly, he believes that single-sex education is beneficial for both men and women, but because of his ethical views it should not be practiced in publicly-supported colleges. In his view, as *Four Critical Years* bears out, single-sex education should be restricted to private colleges.

By adhering to the public-private distinction, Dr. Astin creates a different ethical quagmire. As Dr. Fox-Genovese pointed out, private colleges are prohibitively expensive for students who come from families that are in the middle and lower income strata of society. Moreover, the public-private shibboleth is more apparent than real. It cannot be gainsaid that private colleges receive substantial infusions of both federal and state money. Thus, the distinction Dr. Astin draws is illusory.

The United States also offered the testimony of Dr. Carol Nagy Jacklin who testified that the plan homogenizes women by assuming that there is an appropriate way to educate women. Tr. 873 (Jacklin). The essence of Dr. Jacklin's testimony can be summarized thusly: Gender is not a useful predictor

of learning patterns. Tr. 870-75 (Jacklin). Dr. Jacklin based her statement on her research which, according to her, shows a greater disparity in learning patterns within a gender group than exists between the two gender groups. She proceeded to illustrate her thesis with bell curve graphs as to each of the sexes groups. For both men and women the bell curve was a typical one—small numbers of persons at the beginning and ending with large numbers of persons in the middle. Of interest, however, was a narrow band where there was no overlap between the curve for males and the curve for females. When one thinks about Dr. Jacklin's conclusions, she is stating what educators—indeed, the public in general—have known for a long time; that people are born with varying degrees of ability and drive. It is certainly no revelation that within a given population of males, there will be slow learners, average learners, and fast learners. The same holds true with any given population of females. Thus, the bell curves are not surprising. Moreover, the education experts who find a need for single-sex colleges do not base their opinion on the difference in cognitive abilities of male and females, but rather on developmental and emotional differences between the sexes. *See, e.g.*, 766 F.Supp. at 1434-35 (Liability App. at VI.B)

Dr. Jacklin's testimony was contradicted by most of the evidence in the record.[8] In addition, Dr. Jack-

[8] Dr. Jacklin agreed that experts could reasonably disagree with her opinion. Specifically, Dr. Jacklin stated that experts could reasonably disagree as to how to accommodate differences in formulating educational programs. Tr. 906, 921-22 (Jacklin).

lin conceded at least two justifications for single-sex education: (1) men and women are treated differently in the classroom as evidenced by her observation of students at MBC who were passive, while the students she observed at VMI were interactive;[9] and (2) women have more chances for leadership at single-sex institutions. Tr. 887 (Jacklin).

5. *Pedagogical Justification for VWIL Program*

Several experts in women's education testified that VWIL was a pedagogically sound and justified program. Drs. Richardson, Riesman, and Fox-Genovese furnished testimony supporting the appropriateness of the VWIL program and each expressed the opinion that the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach.

Dr. Fox-Genovese testified that VWIL does not need to use the same methodology as VMI with respect to the rat line and the adversative system and that based upon her study of literature and people, there would be little demand for a female VMI but there would be much more significant demand for VWIL. Tr. 138 (Fox-Genovese). Her personal experience and the "overwhelmingly scholarly evidence" —a portion of which is summarized in Defendants' Exhibit 130A—suggest that young women, by the time they reach college, have less confidence in themselves than young men. Young women, according to Dr. Fox-Genovese, do not need to have uppityness

[9] According to Dr. Jacklin, this trend could be exacerbated in a co-educational environment. Tr. 887 (Jacklin).

and aggression beaten out of them.[10] Dr. Fox-Genovese further explained that adolescence is a period of emotional stress and statistically, the emotional stress takes the form of delinquency in men and depression in women. According to Dr. Fox-Genovese, anorexia is rampant among young college women, in part because they doubt themselves and so they want to exercise control. The control they feel they can exercise is over their own bodies. This, testified Dr. Fox-Genovese, is a turning of energy inward instead of projecting it outward. She explained that anorexia is self-discipline turned pathological. What young women need to understand is the fit between a predictable order of the outside world and their own tendencies towards self-discipline. Tr. 252 (Fox-Genovese). Thus, she concluded, the adversative model is not appropriate to accomplish this result. Tr. at 250-52 (Fox-Genovese). Finally, Dr. Fox-Genovese testified that it is important for states to maintain tax-supported single-sex educational opportunities because of the expense of private single-sex programs. Public single-sex opportunities will provide the most benefit to poorer women and men who, according to Dr. Fox-Genovese, would probably benefit the most from single-sex education.[11] Tr. 291 (Fox-Genovese).

Dr. Richardson testified that "[T]here is not in the VMI paradigm a place for the woman leader

[10] Dr. Wilson concurred, testifying that women do not need the leveling experience of a rat line and adversative methods and that women are generally raised with a lower self-image than men. Tr. 340 (Wilson).

[11] Dr. Fox-Genovese explained: "My position is that the existence of [tax-supported] single-sex education is an extremely important option."

who excels and does those things that women are expected to do now and in the 21st century." Tr. 611-12 (Richardson). Dr. Richardson further testified that he does not believe that the VMI model is achievable from the public policy perspective because it is deficient from the standpoint of attracting a sufficient clientele and from the standpoint of achieving a reasonable degree of acceptance from the Commonwealth.[12]

Dr. Riesman testified that VWIL is a "wholly appropriate way to proceed" to prepare women as citizen-soldiers. Tr. at 539-40 (Riesman).[13] Dr. Riesman opined that the fact that this litigation may end with this new program and VMI still extant is a tremendous achievement, not only for Virginia but for the country. Tr. 474 (Riesman). Dr. Riesman stated, "Given the women now coming to higher education, what is offered in VWIL is a model for the country, with potentially enormous consequences to reverse the unhappy, often unequal, output of coeducation." After evaluating the Commonwealth's plan, Dr. Riesman concluded that VWIL will produce the kind of self-assurance in the face of accomplish-

[12] Dr. Richardson examined demand at Virginia Tech and at West Point and concluded that the demand for an all-women's VMI would be so small as to make the project unfeasible. Tr. 611-15 (Richardson). At trial, Dr. Richardson testified that he interviewed 20 women currently enrolled in the ROTC program at VPI and only one of the 20 wanted a VMI-type experience. Dr. Richardson further testified that a mirror-image VMI would only enroll 25-30 students.

[13] Dr. Riesman was not involved directly in preparing the Plan. Tr. 543 (Riesman). He knows MBC's president, Dr. Tyson, and has reviewed drafts of the Plan and responded to requests for his comments. Tr. 508 (Riesman).

ment of difficulties that VMI offers and requires of its cadets. Tr. 496 (Riesman).

Given the testimony of Drs. Fox-Genovese, Richardson and Riesman—and the absence of any testimony from the United States' experts indicating that VWIL's methodology is inappropriate or ineffective for women—I find that the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping. This is not to say that some women cannot succeed within a VMI type methodology. The evidence at trial indicated that the VMI methodology could be used to educate women and, in fact, some women—such as the allegorical Jackie Jones—may prefer the VMI methodology to the VWIL methodology. As discussed above, however, the controlling legal principles in this case do not require the Commonwealth to provide a mirror image VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment-and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex.

B. *Planning Assumptions*

The United States' second line of attack on the Commonwealth's plan is that the plan employs faulty financial assumptions.

1. *General Assumptions/Enrollment Projections*

At trial, the government challenged the planning assumptions underlying the VWIL. According to the government, the assumptions are faulty. Primarily, the government argues the Task Force's working assumption of 25 students in VWIL in the first year for planning purposes[14] is merely a guesstimate without a sound factual basis. I disagree. The Commonwealth acknowledges that the Task Force did not undertake a market study for VWIL, but offers two sound reasons for this. First, MBC's experience in attracting students to the traditional program informed its judgment that an intensified state-supported program would have sufficient appeal to make the program workable. Second, the 25 student estimate is based upon MBC's experience with the PEG program and is also a number beyond which incremental costs per student will not exceed incremental revenues. Tr. 219-20 (Lott).[15] Furthermore, there is no cap on the number of students MBC will accept into VWIL. MBC has additional residential capacity for 100-150, and MBC agrees it will accept VWIL students in lieu of traditional students if it becomes necessary. Tr. 131 (Lott).

MBC has a good record of success in developing and implementing innovative educational programs.

---

[14] Tr. 210-11 (Lott); *See also* Plf.'s Ex. 102.

[15] Based on his experience with new programs in higher education in the Commonwealth, Dr. Finley testified that 25 is a good projection of the first VWIL class size. The prototype class for the new College of Integrated Science and Technology at James Madison University is 40. Dr. Finley has reviewed proposals for other new programs with numbers in the 10 to 25 range. Tr. 131 (Lott).

The success of MBC's PEG program validates MBC's ability to provide distinct programs and suggests that MBC has the ability to successfully implement the VWIL program.

2. *VWIL Financing*

The United States also disputes sufficiency of VWIL's financing as presented by Dr. Lott.[16] Dr. Lott, who has experience in planning for new educational programs and in funding new educational programs, testified that the VWIL program is adequately financed.[17]

---

[16] Dr. Lott, Dean of MBC, developed the financial projections for the VWIL program that are reflected in Defendants' Exhibit 45.

[17] Dr. Lott testified that the financial projections that he prepared, and which are reflected in defendants' Exhibit 45, were based upon the amount of money necessary to cover the start-up costs of the VWIL program regardless of the number of students in the VWIL program. The start-up funding is adequate for the projected 25 VWIL students in the first year of operation, and, if more than 25 students are admitted to the VWIL program in the first year, the additional revenue from the Commonwealth, and the tuition provided by these students, will be adequate to cover the marginal increased costs. Tr. 220-21 (Lott).

Dr. Finley prepared a "Pro-Forma Expenditure & Income Statement" for the VWIL program based upon his review of the financial projections of the VWIL program prepared by Dr. Lott and his discussions with Dr. Lott. Defs.' Ex. 15. As projected by Dr. Finley, the VWIL program will produce income in excess of expenditures for the first four years of operation of $48,700; $215,775; $398,026; and $606,559. The projected contingency funds available for the first four years of operation of the VWIL program are 7.7%, 24.8%, 35.2% and 43.7% of revenues over expenditures. Defs.' Ex. 15. In conducting his review, Dr. Finley relied upon the professional

The United States argues that there is no reason to expect the increased tuition revenues to meet the increased costs of additional students. At trial, however, Dr. Finley stated that the tuition and fees received from new students combined with revenues received from the state contract could accommodate increased admissions. Both Dr. Lott and Dr. Finley

---

judgment of Dr. Lott and that of his colleagues in putting the VWIL program together. Dr. Finley's approach was to review with Dr. Lott each of Dr. Lott's assumptions to determine whether it was reasonable, and to review with the MBC administration whether it had resources in place to address each of the components of the Remedial Plan. Dr. Finley testified that he was convinced that this had been accomplished. Tr. 1488 (Finley).

Dr. Finley testified that based upon his discussions with Dr. Lott, his knowledge of Dr. Lott's professional experience, and based upon a series of questions posed, he believed that Dr. Lott had used appropriate concepts in developing his financial basis for the VWIL program, had thought through the VWIL program very carefully, and had well laid his plans for adding faculty where needed. Tr. 1460-61, 1512 (Finley). Furthermore, in addition to the anticipated income in excess of expenses stated above, the VWIL program will have the additional asset of the Unique Military Appropriation which will be shared per capita by the entire Virginia Corps of Cadets. Tr. 1466-67 (Finley); 668-70 (Sgro).

Based upon his analysis and review, Dr. Finley opined that, if more than 25 students enroll in the VWIL program the first year, increased economies of scale would permit the program to be financially feasible. Tr. 1467 (Finley). On the income side, the revenue from tuition and fees would increase, the VMI endowment income would remain the same, and the state contract would expand to accommodate the additional students. The Budget Bill, as introduced, contains the proviso that, in the event more than 25 students enroll in the first year, the Commonwealth would put in additional monies on a per-student basis to accommodate the increase. Tr. 1467 (Finley).

are well-experienced in funding new educational programs. They approached the task in the same manner that most businesses use in predicting necessary funds for a new venture, i.e., a *pro forma* statement based on assumptions of what is likely to occur in the future. The assumptions of Drs. Lott and Finley are reasonable, and that is all that is required at the planning stage.

The United States also argues that the out-of-pocket costs for VWIL students will be greater than those of VMI cadets.[18] This conflicts directly with Dr. Sgro's testimony that the VWIL tuition will cost the same as VMI tuition. Dr. Sgro testified that the Commonwealth of Virginia will provide the same amount of financial support to MBC for in-state cadets in the VWIL program that it provides to VMI on a per full time equivalent student basis. Defs.' Ex. 12; Tr. 667-68 (Sgro).[19]

---

[18] According to the United States, each institution will collect $6,830.00 in tuition from each student. The United States argues that VMI students will have an additional $490,415.00 of state financial aid distributed to them to help defer the costs of the $6,830.00 in tuition and fees—but no money has been designated by the Commonwealth to help defer the amount of tuition and fees to be collected from VWIL students. The evidence indicates, however, that the Commonwealth will pay dollar-for-dollar for VWIL students as it pays for VMI. Defs.' Ex. 12 at 94. For a student to obtain additional funds at either institution, he/she must qualify for student aid on the basis of need.

[19] In addition, the Unique Military Appropriation which VMI receives will be shared on an equal, pro rata, basis with MBC and Virginia Tech so that each of the three corps of cadets will receive financial support from the Unique Military Appropriation presently provided only to VMI. Tr. 668-70 (Sgro); Tr. 1466-67 (Finley); Defs.' Ex. 12 at 128-29. Furthermore, the State Cadetships, presently allotted only to VMI, will be shared equitably among the students participating in the three Corps of Cadets. *Id.*

The Commonwealth's Support of the Remedial Plan

The Commonwealth of Virginia has an avowed policy of offering a diversity of choices in higher education. The Fourth Circuit expressed misgivings as to whether VMI's all-male admissions policy was in fact an official state policy. The record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education for men and women. Contrary to the perceptions of many, the Commonwealth's position in this Court has always been supportive of VMI's all-male admissions policy because it adds to the diversity of choices in Virginia's higher education system.[20] This support is evidenced by the affidavits of all of the Commonwealth's top officials entered into the record in this case.

---

[20] Although former Governor Wilder, during his brief campaign for the 1992 Democratic presidential nomination, made extrajudicial statements criticizing VMI's all male admissions policy, his position in this Court has always been one supporting VMI's all male admissions policy. *See* Governor Wilder's Answer, Liability Trial. In any case, Governor Wilder's prior extrajudicial statements against VMI's all male admissions policy notwithstanding, the former Governor's affidavit tendered in this phase of the litigation again expresses his support of single-sex education for men and women by "approv[ing] the remedial plan proposed by the VMI defendants." *See* VMI Remedy Ex. 5. *See also* Defs.' Ex. 11-R at 2-3. (Governor Wilder's statement supporting the VWIL plan stating that he is "satisfied that this plan is educationally sound and will remedy all current discrimination.").

Governor George F. Allen has filed an affidavit in which he states that: "[VWIL] will enhance diversity in Virginia higher education and provide for the women of the Commonwealth a unique and innovative educational alternative." Defs.' Ex. 1 at 1-2.[21] Former Governor L. Douglas Wilder filed an affidavit approving the remedial plan, Defs.' Ex. 5, and has commented that "I and my staff have worked closely with Mary Baldwin College and VMI in crafting a program to remedy the discrimination. . . . [and VWIL] extends to women across our Commonwealth the benefit of a single-sex education which Virginia presently makes available to men at VMI." Defs.' Ex. 11-R at 2. Lieutenant Governor Donald S. Beyer, Jr. has also filed an affidavit supporting the remedial plan stating that VWIL "will enhance and contribute to the diversity of educational opportunities which are available to college-age women in Virginia and will make Virginia a leader in providing such opportunities to women. Diversity of educational opportunity is a hallmark of the Virginia system of higher education." Defs.' Ex. 2 at 1. Attorney General James S. Gilmore, III. has also filed an affidavit supporting the remedial plan as have J. Paul Councill, Jr., the Chairman of the House of Delegates Education Committee, and Elliot S. Schewel, Chairman of the Senate Education Committee. Virginia's Secretary of Education, Dr. Beverly H. Sgro supports the Proposed Remedial Plan because it provides diversity of education in Virginia,

[21] In addition to supporting the remedial plan, Governor Allen explains in his affidavit that a VMI for women "is economically prohibitive. 'The lack of demand, the dubious educational benefit and the tremendous cost of establishing such a college preclude that option." Defs.' Ex. 1.

which is one of the primary goals of Virginia as stated in the Report of the Commission on the University in the 21st Century. Defs.' Ex. 213. The State Council on Higher Education has also indicated its support of the Proposed Remedial Plan stating that it would be "pleased to work with the administration of [MBC] to develop the strongest possible program should the proposal submitted to the court be judged acceptable." Defs.' Ex. 8. Finally, that the Commonwealth's 1994-96 budget bill, which funds the remedial plan and passed both houses of the legislature, indicates clearly the Commonwealth's support of single-sex education for women and men. In short, every person in Virginia officialdom who has or has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth and have strongly supported VWIL.

Conclusion

VWIL is a new venture and no one can predict with certainty its outcome. The evidence, however, supplies a reasonable basis for predicting success in attaining its stated goals. No doubt the program will need further adjustment as experience dictates; however, according to Dr. Lott, the program is fully developed conceptionally and ready to be implemented for the Fall of 1995. During the implementation of VWIL, it will remain under the supervision of this Court.

The Commission on the University in the 21st Century has recommended that "private colleges and universities should be encouraged to expand enrollment (in response to projected increases of college-

bound students), supported by the Tuition Assistance Grant Program and the contract for services program." Defs.' Ex. 213. In exercising its sovereign prerogative to structure its system of higher education, the Commonwealth has determined to follow the recommendations in the Report of the Commission on the University of the 21st Century by providing diversity in education and utilizing the talents of private colleges within its borders. Defs.' Ex. 11 at 4. In so doing, it has chosen to maintain VMI as an all-male institution and, through VWIL, to maintain an all-female institution.[22] *See generally*, Defs.' Ex. 11.

If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination. The defendants' Proposed Remedial Plan will be approved.

An appropriate order will enter.

---

[22] As one commentator aptly observes, the purpose of the remedy in this case "is not that VMI ought to be preserved as an all-male bastion, but that the Commonwealth ought to be given broad leeway in determining how best to ensure that women are provided an equal opportunity within the Commonwealth's system of higher education." Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 Wash. & Lee L.Rev. 35, 47 (1993).

ORDER

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is hereby ADJUDGED and ORDERED that:

1. Defendants' Motion to approve their Proposed Remedial Plan is GRANTED;
2. Defendants' are directed to proceed with all deliberate speed in implementing the Plan and to have the Plan operational for the academic year commencing in the Fall of 1995;
3. the Court will retain jurisdiction in order to supervise implementation of the Defendants' Plan;
4. Defendants' will be required to submit status reports apprising the Court of the progress of the Plan implementation every six (6) months;
5. this ruling is dispositive of all pre-trial motions.

APPENDIX: FINDINGS OF FACT

I. Witnesses ..... [87a]
A. Expert Witnesses ..... [87a]
B. Fact Witnesses ..... [99a]

II. The Proposed Remedial Plan ..... [101a]
A. Development of VWIL Program at Mary Baldwin College ..... [101a]
B. Contract for Services ..... [104a]
C. Cooperation with VPI ..... [105a]
D. MBC' Commitment to VWIL ..... [106a]
E. Further Development of VWIL ..... [106a]

III. Status Report/VWIL Program Specifications ..... [107a]
A. Mission of VWIL ..... [107a]
B. Academic Offerings and Requirements of VWIL ..... [108a]
C. Military Leadership and Training ..... [109a]
D. Physical Education and Training ..... [111a]
E. Co-Curriculum ..... [114a]
F. VWIL/MBC Residence Life ..... [115a]
G. VWIL's ROTC Component ..... [116a]
H. Endowment ..... [120a]
I. VWIL Access to VMI Alumni Network ..... [120a]

IV. Mary Baldwin College (MBC) ..... [122a]
A. History/Background ..... [122a]
B. MBC Facilities ..... [126a]

V. VMI ..... [129a]

VI. Differences Between VWIL and VMI ..... [129a]
A. Faculty ..... [129a]
B. Endowment ..... [129a]
C. Physical Training Facilities ..... [130a]
D. Academic Programs ..... [131a]

The findings of fact set forth in this Appendix fall into three categories: (1) the curriculum vitae of each of the expert witnesses and a description of the fact witnesses for each side; (2) a description of the VWIL plan; and (3) a profile of Mary Baldwin College and how it compares with VMI.

Because a great majority of these findings are historical facts and are essentially uncontroverted, I found it convenient to use the format and much of the substance of the Defendants' Proposed Findings of Fact. Virtually all of these findings provide references to the record for their support.

Unless otherwise indicated, all references to exhibits and trial transcripts refer to the remedial phase of this litigation. Transcript citations refer to the unofficial transcript.

I. WITNESSES

A. *Expert Witnesses*

(i) Defendants' Expert Witnesses

1. Lewis D. Askegaard testified as a defense expert in educational assessment. He earned a B.A. in English, a Master of Education Degree in Curriculum, and a Ph.D. in Educational Evaluation from the University of Virginia. He has participated in a number of federally funded assessment projects, has trained educators and social workers in assessment methodology, has assisted the State of Virginia in designing assessment strategies, has served on numerous evaluation committees for the Southern Association of Colleges and Schools, has served on the Steering Committee of the Virginia Assessment Group, and is recommended by the Southern Asso-

ciation of Colleges and Schools as an expert in assessment. Currently, Dr. Askegaard serves as Associate Dean of Mary Baldwin College, Registrar, and Director of Institutional Research. Tr. 1361-65 (Askegaard); Defs.' Ex. 110.

2. Josiah Bunting, III, testified as a defense expert in higher education with concentration on single-sex education, and as an expert in leadership. He graduated from VMI in 1963, won a Rhodes Scholarship, and earned an M.A. at Oxford. He served in the United States Army from 1966 to 1972, serving in the infantry, and as Assistant Professor at West Point. From 1972 to 1973, he was Professor and Acting Head of the Department of Strategy, U.S. Naval War College. From 1973 to 1977, he served as President of Briarcliff College, then an all-female college. From 1977 to 1987, he was President of Hampden-Sydney College, an all-male college. Since 1987, he has served as Head Master of The Lawrenceville School, a private preparatory school in Lawrenceville, New Jersey, where he presided over the school's change in status from single-sex to co-educational. Mr. Bunting served as a defense expert in the liability phase of this case. Tr. 1536-39 (Bunting); Defs.' Ex. 111.

3. Paul O. Davis testified as a defense expert on human physiology. Dr. Davis served as a defense expert in the liability phase of this case. He earned a Bachelor's Degree from Columbia Union College, a Master's Degree in physical education from American University, and a Ph.D. from the University of Maryland College of Health and Human Performance, Department of Kinesiology, with a major in exercise physiology and a minor in research design and statistics. He has taught physical education to

both sexes at the elementary school, junior high school and high school levels, and has taught applied physiology at the University of Maryland. Liability Tr. 879-84 (Davis). He is a Fellow of the American College of Sports Medicine. Tr. 1399-1400 (Davis). He has consulted extensively for the United States Armed Forces on developing physical training programs for men and women. Liability Tr. 882-84 (Davis). Dr. Davis has published prolifically in his field. Defs.' Ex. 113.

4. Donald J. Finley testified as a defense expert in higher education finance in Virginia. Dr. Finley has a Doctor of Education Degree in Higher Education Administration from the College of William and Mary, and Bachelor's and Master's Degrees in Business Administration from the University of Richmond. He has served as Assistant Director of the State Council of Higher Education for Virginia, as Staff Director and Senior Fiscal Analyst for the House Appropriations Committee of the Virginia General Assembly, as Deputy Secretary of Finance for the Commonwealth of Virginia, and as Secretary of Education for the Commonwealth of Virginia under Governor Robb and Governor Baliles. Dr. Finley presently serves as Associate Director of the State Council of Higher Education for Virginia, with responsibility for finance and facilities. Tr. 1450-58 (Finley); Defs.' Ex. 114.

5. Elizabeth Anne Fox-Genovese testified as a defense expert in women's issues, feminist theory, gender, higher education with particular reference to women's education, single-sex education and curriculum development, and the history of American women. She is currently professor of history and Eleonore Raoul Professor of the Humanities at

Emory University in Atlanta, Georgia. She is also an associate member of the English Department, a core member of the Women's Studies Department, and a member of the Comparative Literature faculty.

Dr. Fox-Genovese began her work in women's studies as an assistant professor at the University of Rochester, where she taught one of the first courses nationally in Women's History and developed an interdisciplinary minor in Women's Studies. In 1980 she moved to the State University of New York at Binghamton to help design the first graduate program in Women's History in the country. In 1986, she was selected in a national search to become Founding Director of Emory University's Women's Studies program, which encompasses an undergraduate minor, an undergraduate major, graduate degrees, and certifications in Women's Studies.

She has published a number of books, including *Feminism Without Illusions: A Critique of Individualism* (University of North Carolina Press, 1991) and *Within the Plantation Household: Black and White Women of the Old South* (University of North Carolina Press, 1988), 45 articles, and numerous lectures. She has been selected by the United States to direct a national project on women in history, serves as a member of the Steering Committee of the Holmes Group to study the state of contemporary education, served as a member of the Steering Committee for the National Assessment Project, serves as a member of the Steering Committee of the National History Standards Project, and serves as a board member of the American Academy for Liberal Education, which is developing new accreditation standards for small liberal arts colleges. Tr. 225-35 (Fox-Genovese); Defs.' Ex. 115.

6. James D. Lott testified as a defense expert in higher education, single-sex education, leadership education for women, curriculum and program development. Dr. Lott serves as Dean of the College at Mary Baldwin College. He received his B.A. from the University of Tennessee, M.A. from Vanderbilt University and a Ph.D. at the University of Wisconsin. He has taught for 30 years at MBC. In his 30 years of experience at a women's college, he has developed expertise in curriculum development, single-sex education, women's cognitive, moral, and leadership development, and the development of new programs, including financial planning. Tr. 52-67 (Lott); Defs.' 116.

7. Richard C. Richardson, Jr., testified as a defense expert in higher education, with particular expertise and hands-on experience in developing academic co-curricular programs and in public policy and higher education. Tr. 603-06 (Richardson). Dr. Richardson is also an expert in women's education. Tr. 640 (Richardson). He is Professor of Educational Leadership and Policy Studies at Arizona State University. He holds a B.S. degree in education from Castleton State College, an M.A. from Michigan State University, and a Ph.D. from the University of Texas. He served in the Marine Corps for three years. He taught at an all-female college, Vermont College, from 1958 to 1961, and has both professorial and administrative experience at several colleges and community colleges, including institutions with large minority populations. His publications include *Creating Effective Learning Environments: State Policy and College Learning* (Denver, Co., Education Commission of the States, March 1993); *Improving State and Campus Environments for Quality*

and Diversity: A Self-Assessment (with Matthews and Finney, Denver, Co., Education Commission of the States, 1992); *Promoting Fair College Outcomes: Learning from the Experiences of the Past Decade* (Denver, Co., Education Commission of the States, 1991); *Achieving Quality and Diversity: Universities in a Multicultural Society* (with E.F. Skinner, New York, ACE/McMillan, 1991); and *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities* (with L.W. Bender, San Francisco, Jossey-Bass, 1987). He testified as a defense expert in the liability phase of this case. Liability Tr. 661-66 (Richardson). He has also been retained by the United States to testify on its behalf in race discrimination lawsuits involving higher education. He has served as chair of 25 evaluation teams on behalf of regional higher education accreditation boards, including the team that most recently evaluated West Point. Defs.' Ex. 118. His research in the past 10 years has focused on "the impact of students on colleges and the impact of colleges on students." Liability Tr. 664-65 (Richardson).

8. David Riesman, Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University, testified as a defense expert in sociology, with a particular emphasis on culture, personality and character, higher education in the United States and single-sex education for women. Tr. 506-07 (Riesman). He holds a bachelor's degree from Harvard College, a law degree from Harvard Law School and honorary degrees from more than twenty institutions. After completing a year of postgraduate study, he served as the last law clerk to Justice Louis D. Brandeis of the United States Supreme Court. He

taught at Buffalo School of Law, and served as a research fellow at Columbia Law School in sociology and anthropology. He joined the faculty at the University of Chicago in 1946, and returned to Harvard in 1958. He is regarded as "one of the first and still is one of the most influential among social scientists who have systematically applied the concepts of culture and personality to contemporary society. His book, *The Lonely Crowd*, is highly acclaimed in the field, and his concepts of 'inner-directed' and 'other-directed' [personalities] have been incorporated into the general vocabulary." Liability Tr. Defs.' Ex. 8 at 29. He has focused his research in recent years on the development and present state of American higher education. Clark Kerr, head of The Carnegie Foundation on Higher Education, described Dr. Riesman as "the best informed, most insightful, most interesting commentator on higher education in the United States. And he has no peer in any other nation." Defs.' Ex. 124. His many publications include *The Lonely Crowd* (1950); *Constraint and Variety in American Education* (1956); *The Academic Revolution* (with Christopher Jencks 1968); and *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (with several collaborators 1980). His latest book is *Choosing a College President: Opportunities and Constraints* (1990). Dr. Riesman served as a defense expert in the liability phase of this case. Defs.' Ex. 119.

9. Cynthia Haldenby Tyson testified as a defense expert in single-sex education for women, women's educational development and women's leadership development. Dr. Tyson is President of Mary Baldwin College. She previously served as Vice President for Academic Affairs, Dean of the College, Chairman of the Division of Humanities, and English Professor

at Queens College, Charlotte, North Carolina (then a women's college), as well as Associate Professor of English at Seton Hall University (then a men's college). She received her B.A., M.A. and Ph.D. degrees from the University of Leeds in England. Dr. Tyson has spent 25 years focusing on the education of women at two women's colleges as a teacher and an administrator. She has written and lectured widely on women's education. She has also received certificates in advanced studies for college administrators at Harvard University. Dr. Tyson has served as president of the Southern Association of Colleges for Women and as a commissioner of the Southern Association of Colleges and Schools. Tr. 358-67 (Tyson); Defs.' Ex. 121.

10. Major General Robert Edwin Wagner, U.S. Army (Retired), testified as a defense expert on leadership in the military. Tr. 565 (Wagner). General Wagner currently serves as Executive Assistant to the President of Norfolk State University, a predominantly Black institution. Before his recent retirement from the military, General Wagner served as Commanding General of the United States Army ROTC Cadet Command where he supervised all of the Army's pre-commissioning training. A liberal arts graduate of VMI, Major General Wagner served 33 years as an armor officer, in positions ranging from platoon leader to assistant division command. He spent three years in Vietnam. Tr. 550-66 (Wagner); Defs.' Ex. 122.

11. Heather Anne Wilson testified as a defense expert in the psychological, social, emotional and intellectual development of college women. Dr. Wilson is Dean of Students at Mary Baldwin College, responsible for residence life, student activities, international students, housing and counseling. She holds a B.A. in English from Bucknell University, a Master's degree in Counseling from Boston University, a Master's in Institutional Research and Planning from Columbia University, and a Doctorate in Higher Education from Columbia University. The primary focus of her 20 years' experience in higher education has been the education and development of women. She has worked at coeducational and single-sex colleges—the University of Arkansas, Oklahoma State University, Marymount College in New York City and Clarkson University. Her experience includes work both as a counselor to women students and as a supervisor and developer of counseling services for women students. She has also been involved in developing leadership programs for women. Tr. 326-33 (Wilson); Defs.' Ex. 123.

(ii) Government's Expert Witnesses

1. Alexander William Astin testified as a Government expert in higher education, assessment and the comparability of higher education programs. He received his Bachelor's Degree from Gettysburg College and his M.A. and Ph.D. Degrees from the University of Maryland. Dr. Astin is currently Professor of Higher Education at the University of California at Los Angeles and Director of the Higher Education Research Institute there. Dr. Astin's books include *What Matters in College? Four Critical Years Revisited* (1993); *Assessment for Excellence: The Philosophy and Practice of Assessment and Evaluation in Higher Education* (1991); *Four Critical Years* (1977); and *The College Environment* (1968). *Higher Education* (1991); *Four Critical Years* (1977); and *The College Environment* (1968). Tr. 1216 (Astin).

2. Mr. James Francis Brewer, III, testified as the United States' expert in planning, designing and operating higher educational facilities. Tr. 818 (Brewer). He has been Director of Physical Plant at the University of Maryland at College Park since 1985. He holds B.S. and M.B.A. degrees from the University of Maryland. He testified for the United States in the liability phase of this case. Plf.'s Ex. 9.[1]

3. Clifton Conrad testified as the United States' expert on curricular and co-curricular offerings. Tr. 1040 (Conrad). He is currently Professor of Higher Education and Coordinator of the doctoral program in Higher Education at the University of Wisconsin-Madison, and previously had been on the faculties of the University of Denver, the College of William and Mary, and the University of Arizona. He holds a Bachelor's Degree from the University of Kansas and a Ph.D. in higher education from the University of Michigan. His books and monographs include *The Undergraduate Curriculum* (1978), *Liberal Education in Transition* (1980, with Jean Wyer), and *Curriculum in Transition: Perspectives on the Undergraduate Experience* (1990, with Jennifer Haworth). In 1987-88, he served as president of the Association for the Study of Higher Education.

[1] Mr. Brewer testified on the facilities at VMI and MBC. From the liability phase, the Court is already familiar with VMI facilities. Both the Justice Department and the Defendants submitted video tapes of MBC which depicted MBC facilities. Defs.' Ex. 44A; Plf.'s Ex. 104, Mr. Brewer's testimony, essentially factual in nature, shed little additional light on this marginal issue, and the Court is not in need of expert testimony to assist in its understanding of the schools' facilities.

Plf.'s Ex. 7. He testified for the government in the liability phase of this case, and on behalf of the Civil Rights Division on other occasions. In the liability phase this Court concluded that Dr. Conrad's testimony was entitled to "little weight" because his opinions were based on his personal belief that single-sex education, while beneficial, should not be provided by the public sector. *United States v. Virginia*, 766 F.Supp. at 1412.

4. Carol Nagy Jacklin testified as a Government expert in the psychology of gender, psychology of gender as it relates to learning, developmental psychology and developmental psychology as it relates to learning. Tr. 854-55 (Jacklin). Dr. Jacklin is currently a professor of psychology and Dean of Social Sciences and Communication at the University of Southern California. She received Bachelor's and Master's Degrees from the University of Connecticut and a Ph.D. from Brown University in psychology. She published *The Psychology of Sex Differences* (1974, with Eleanor Maccoby), a meta-analysis. She is a Fellow of the American Psychology Association and a Fellow of the American Psychology Society. Tr. 851-55 (Jacklin); Plf.'s Ex. 6.

5. Michael S. Kimmel testified as a Government expert in historical sociology and the sociology of gender. Tr. 935 (Kimmel). Dr. Kimmel received his B.A. from Vassar College, his Master's Degree from Brown University, and his Doctorate from the University of California at Berkeley. He is an Associate Professor of Sociology at the State University of New York at Stony Brook and is presently a visiting professor at Berkeley. He has taught, published and lectured in the area of comparative historical

sociology of gender. He is currently editor of *Masculinity* and is President of NOMAS, the National Organization of Men Against Sexism. Tr. 928-35 (Kimmel); Plf.'s Remedy Ex. 8.

6. Larry Lee Leslie testified as the Government expert in higher education finance. Dr. Leslie is Professor and Director of the Center for Study of Higher Education at the University of Arizona. The focus of his academic work has been the economics and financing of higher education. He received his Bachelor's and Master's degrees from the University of Minnesota and his Doctorate in Education from the University of California, Berkeley. Dr. Leslie has testified on three other occasions for the Civil Rights Division. Tr. 731-36 (Leslie); Plf.'s Ex. 4.

7. James A. Peterson testified as a Government expert in fitness training for women. Dr. Peterson currently serves as Director of Sports Medicine for StairMaster Sports Medical Products, a company owned by his brother. He has a B.S. Degree in Business Administration from the University of California, Berkeley, and Master's and Ph.D. degrees in Physical Education from the University of Illinois. He has taught physical education in high schools and colleges. He was in charge of cadet basic training at West Point and was involved with the physical training of women at West Point after coeducation. Remedy Tr. 1114-16 (Peterson). He has also worked at the Women's Sports Foundation at Stanford University. He has written books and articles on fitness training, including the development of certain physiological characteristics in women. Tr. 1111-19 (Peterson); Plf.'s Ex. 3.

B. *Fact Witnesses*

(i) Defendants' Fact Witnesses

1. Carole Lewis Anderson is a member of the Board of Trustees of Mary Baldwin College. She received a liberal arts degree from Penn State University in 1966 and a Master's degree in Business from New York University in 1976. Ms. Anderson worked as a securities analyst and as a merger and acquisitions specialist in the Corporate Finance Department of Paine Webber. In 1985, she became a corporate director and Senior Vice President in charge of corporate development for Hasbro, Inc. She also served as president of the Infant Products Division. In 1987, she joined MNC Investment Bank in Washington, D.C., as President of the Investment Banking Division. Since 1990, she has operated a financial consulting business in Washington, D.C. Tr. 438-40 (Anderson).

2. Paul D. Maini is the Executive Vice President of the VMI Alumni Association. Tr. 459 (Maini). He graduated from VMI in 1966, served as a career Army officer, rising to the rank of lieutenant colonel. He received a Master's Degree in history at Florida State University, attended the Navy War College at Newport, Rhode Island, taught Army ROTC at VMI and taught Western Civilization at the Naval Academy before returning to VMI. Mr. Maini testified as a fact witness in the liability phase of this case. Liability Tr. 870-75 (Maini).

3. Beverly Huston Sgro became the Secretary of Education for the Commonwealth of Virginia in January 1994. She previously served as Dean of Students at Virginia Polytechnic Institute and State University, as Executive Assistant to the Vice Presi-

dent for Student Affairs, as Assistant Director of Student Activities, and as Coordinator for Greek Affairs at Virginia Tech. She holds a Bachelor of Science degree in Speech Pathology and Audiology from Texas Women's University, and a Master of Science in Management, Housing and Family Development and a Ph.D. in Educational Research and Evaluation, with an emphasis on policy analysis, both from Virginia Tech. Tr. 661-63 (Sgro); Defs.' Ex. 120.

(ii) Government's Fact Witnesses

1. Captain Tamara Frezell, U.S. Army, is a 1989 graduate of the U.S. Military Academy at West Point. She is a native of Petersburg, Virginia. She served in the Quartermaster Corps and is now a member of the West Point staff serving as Equal Opportunity Admissions Officer. Tr. 983-84 (Frezell).

2. Colonel James Siket, United States Army, is a graduate of West Point and a career Army officer. He has a Master's Degree in Business Administration from Auburn University. He is a graduate of the Army War College. He has spent the last six and one-half years as Regimental Tactical Officer and Brigade Tactical Officer at the U.S. Military Academy at West Point.[2]

---

[2] The United States proffered the testimony of Col. Siket who described a "day in the life" of West Point cadets. As this subject was covered at length in the liability phase of this proceeding, the Court granted the defendants' motion to strike the testimony of Col. Siket, and his testimony played no part in the Court's determination of the issues on remand. Tr. 981 (Siket).

II. THE PROPOSED REMEDIAL PLAN

A. *Development of VWIL at MBC*

1. In academic year 1992-93, Dean Lott established a long-range planning process. As part of the process, the faculty informally reexamined MBC's mission and began considering a more deliberate focus on leadership. At the same time, Dr. Wilson increased emphasis on leadership development in the co-curriculum and won a grant to develop a leadership program. Parallel development in the curricular and co-curricular areas prepared MBC for a new venture in leadership formation. Tr. 73-74 (Lott).

2. In midsummer 1993, President Tyson discussed with Dean Lott the possibility of developing a program for the education and training of women citizen-soldiers. Tr. 74-75 (Lott). The purpose was to meet the Commonwealth of Virginia's desire to provide women the access to a single-sex educational program which would prepare them for leadership positions in civilian and military life. Tr. 73-74, 204 (Lott); *see also* Defs.' Exs. 11, 39. Lott and Tyson examined what VMI meant by the term "citizen-soldier" and used as a starting point the notion that a citizen-soldier is comfortable with and capable of taking on leadership positions in civilian, both private and public, and in military life. Tr. 89-90 (Lott). A four part holistic program is envisioned to produce women citizen-soldiers: the curriculum, the co-curriculum, military training including ROTC, and physical education and training. Tr. 74-75 (Lott); Defs.' Exs. 11, 39. The MBC Board of Trustees' Executive Committee approved the concept in July 1993. Tr. 76 (Lott).

3. President Tyson and Dean Lott then discussed the concept with other members of the MBC executive staff. They were also in contact with Dr. Richardson. Tr. 75, 219 (Lott). At the end of the summer, the MBC executive staff called together twelve senior faculty leaders and reviewed the concept with them. Tr. 75 (Lott). President Tyson also surveyed by telephone the full Board of Trustees during the planning phase. Tr. 76 (Lott); 457-58 (Anderson). The MBC faculty voted to approve the development of VWIL on September 24, 1993. Tr. 75-76 (Lott).

4. On September 24, 1993, MBC entered into an agreement with the VMI Foundation, Inc., which committed to provide funding for VWIL if it receives court approval. Defs.' Ex. 11-N.

5. On September 25, 1993, Dr. Tyson met with the VMI Board of Visitors and reviewed the VWIL concept. The Board of Visitors voted to provide the cooperation and resources of VMI to VWIL and to submit the VWIL proposal in the Proposed Remedial Plan. Defs.' Exs. 11-O, 11-Q.

6. On September 25, 1993, Governor Wilder approved the Plan. Defs.' Ex. 5.

7. As provided in the Plan, President Tyson designated a Task Force co-chaired by Deans Lott and Wilson to refine and plan for implementation of VWIL. The Task Force includes faculty, administration and student representation. Tr. 76-80 (Lott). Members of the Task Force include a political scientist interested in opportunities for women in political life and experienced in using quantitative methods in approaching problems; a professor of sociology and anthropology, with a particular interest in cultural and societal structures; the college residence

life coordinator, who has particular expertise in developing women's leadership programs; an MBC alumna and professor of theater who understands the need for both cooperative and command leadership; a student in the class of 1996 who is a resident advisor and leader in her own right; and a professor of philosophy with a strong interest in leadership ethics. The Committee also calls on *ad hoc* members as particular expertise is needed in the areas of physical education and training, ROTC and developmental psychology. Tr. 80-82 (Lott); Defs.' Ex. 39 at 17.

8. The Task Force studied leadership issues and the research literature on the developmental psychology of women and the cognitive development of women. Task Force deliberations focused on issues of leadership and the question whether women lead and learn differently than men. The Task Force prepared a bibliography and summaries of literature reviewed by the Committee. The Task Force integrated its collective experience with the research literature. Tr. 83-85, 87-88 (Lott); Defs.' Ex. 131.

9. All elements of the faculty, staff and students came together to design the program and to talk about each other's areas. Dean Wilson, in charge of student life, could offer her thoughts on curriculum. The faculty could offer their thoughts on student life. Tr. 335 (Wilson). The Task Force developed an analogy to the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life. Tr. 110 (Lott). It is an intentionally designed program where all the elements promote the same goals and values, a more intentionally holis-

tic program than the traditional MBC program. Tr. 334-35 (Wilson).

10. From late October to January 17, the Task Force met six times. Members also worked independently. Dean Lott spent close to half his working hours on the VWIL development. Tr. 82 (Lott).

11. Dean Lott and Dean Wilson visited VMI twice. Other Committee members also visited VMI. Tr. 84 (Lott). The Task Force reviewed the assessment materials from VMI and examined the VMI methodology and outcomes. Defs.' Exs. 25, 26, 65; Tr. 87 (Lott). The Task Force considered carefully, in light of their collective experience and the literature on women's education, where VWIL should follow or depart from the VMI methodology to produce the same outcomes. Tr. 83-85 (Lott). On visits to VMI, they observed VMI's holistic education which integrates curriculum and co-curriculum. Tr. 85, 110 (Lott).

B. *Contract For Services*

1. The Plan provides for the Commonwealth to enter into a contract for services with MBC and VMI for VWIL. Defs.' Ex. 11 at 3. Such arrangements have been recommended in a study on the University of the 21st Century commissioned by the General Assembly of Virginia. Defs.' Ex. 213. The study recommends private contracts to eliminate duplication and increase efficiency in higher education. The report also foresaw an increase in the student population in the 1990's and recommended contracts with private colleges as a means by which the Commonwealth could accommodate a growing student

population without building additional facilities. Tr. 367-69 (Tyson).

2. Dr. Tyson has authority on behalf of MBC to enter into a contract for services with respect to VWIL. Tr. 369 (Tyson).

C. *Cooperation With VMI and VPI*

1. VMI has committed to support the VWIL program. On September 25, 1993, the VMI Board of Visitors voted to support MBC's development of VWIL. Dr. Tyson has had periodic conversations with the Superintendent of VMI and the President of the VMI Board of Visitors who have reaffirmed VMI's support. Tr. 369-70 (Tyson).

2. The cooperation to date between VMI and MBC with respect to VWIL has been excellent, that there has been cooperation on many levels, and that VMI has pledged to help in any way MBC asks. Tr. 370 (Tyson). The cooperation between MBC and VMI officials was readily apparent throughout the course of the Phase II proceedings.

3. The Plan provides for establishment of a Joint Advisory Board for Leadership Education between MBC and VMI. The Board will be designed to advance the leadership program and the citizen-soldier concept. It will be composed of faculty, administrators and trustees from MBC and VMI. Among its tasks will be continuous study of the advancement of leadership training at VMI and MBC. There will be evaluation of the assessments and outcomes of the two programs to advance the cause of the citizen-soldier. In addition, the Board will arrange for exchange of faculty and potentially for joint meetings

of students in co-curricular settings. Tr. 370-72, 425, 427 (Tyson); Defs.' Ex. 11 at 15-16.

4. Under the Plan, VWIL will also cooperate with Virginia Tech and VMI in the Virginia Corps of Cadets. Defs.' Ex. 11; Tr. 424 (Tyson).

D. *MBC's Commitment to VWIL*

1. MBC undertook to establish VWIL for several reasons: first, MBC is committed to the education of women in a single-sex environment. Second, MBC faculty have expertise in educating women. They also have experience in innovation. MBC's innovation and creativity characterize it as much as its dedication to single-sex education for women.

2. MBC is committed to continuing the development of VWIL in accordance with the Plan and, specifically, to achieving outcomes comparable to VMI. Tr. 1528 (Tyson).

3. The administration of MBC is professionally and personally deeply invested in the VWIL program and determined to make it succeed. Tr. 344-45 (Wilson).

E. *Further Development Of VWIL*

1. The Task Force proposes to complete development of the curriculum by the end of the current academic year. Tr. 129-30 (Lott). The Task Force will continue to meet and confer with VMI, particularly with respect to co-curriculum and the physical training programs. Tr. 130 (Lott).

2. With Court approval, it is expected that VWIL will admit its first students in the 1995 fall semester. Tr. 130 (Lott).

STATUS REPORT/VWIL PROGRAM SPECIFICATIONS

The Status Report of January 17, 1994 (Defs.' Ex. 39) sets forth the conclusions of the Task Force and the programmatic components of VWIL. On February 4, 1994, the faculty approved unanimously the Status Report and the continuation of the planning process. Tr. 83-86 (Lott). The Status Report recites that VWIL "is based on a working hypothesis about leadership at the beginning of the 21st Century and about the advantages of single-sex education in the development of the qualities of mind and character of women leaders." Defs.' Ex. 93, at 1.

A. *Mission of VWIL*

1. The MBC Task Force concluded that VWIL is appropriate to MBC's commitment "to the education of women for a world of expanding opportunity" in ways which "will lead to flexibility of mind and strength of values and provide the foundation for future careers, professions and positions of leadership." Defs.' Ex. 39 at 4.

2. VWIL will be a publicly-supported, single-sex education program with military training for women.

3. The stated mission of VWIL is to produce "citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service." Defs.' Ex. 11 at 7.

B. *Academic Offerings and Requirements of VWIL*

1. The general education requirements and the academic majors for VWIL students will be the same as those for regular MBC students. Defs.' Ex. 11 at 8.

2. The admission standards for the VWIL would be the same as for the traditional MBC program. Tr. 131 (Lott).

3. VWIL students must complete a calculus course. Defs.' Ex. 39 at 6. MBC currently offers calculus courses, and offered these courses in the 1990-91 school year. Plf.'s Ex. 39 at 79; Plf.'s Ex. 36 at 135-136.

4. VWIL students must complete either a statistics course or "an appropriate discipline-based quantitative methods course. . . ." Defs.' Ex. 39 at 6.

5. VWIL students must complete two science courses with labs, in addition to Biology of Women. Defs.' Ex. 39 at 6.

6. VWIL students must complete a microcomputer applications course "or the equivalent or by passing a competency test." Defs.' 39 at 6.

7. VWIL students will take a leadership externship. This externship, "which should ideally be related to [the student's] major, will be distinguished from other externships by providing an opportunity to experience and reflect on leadership in practice. For instance the student may work for a person whose position she would like to have in ten years and may, in addition to the standard expectations of an externship, be required to keep a journal in which she analyzes and evaluates the leadership styles and strategies she encounters in the externship." Defs.' Ex. 39 at 7; TR 97, lines 13-19 (Lott).

8. VWIL students will participate in the VWIL Seminar, and in Saturday Seminars three times a semester. Defs.' Ex. 39 at 8, 15. VWIL students will also organize a Leadership Speaker Series for one semester of the junior year and one semester of the senior year. Defs.' Ex. 39 at 15.

9. Although eight male non-residential students currently attend some classes with traditional MBC undergraduate women, no male students will attend classes with VWIL students. Tr. 101, 155 (Lott).

10. VWIL students will have the opportunity to earn an engineering degree. Presently, MBC students may participate in a 3-2 program with Washington University. Dean Lott is also "in conversation now with another institution closer-by and [is] moving toward an agreement which would allow a student that option (3-2 engineering)." Tr. 101-02 (Lott). VWIL students would not receive the VWIL tuition discount while participating in the engineering program at Washington University. Tr. 696-97 (Sgro), Defs.' Ex. 12 at 94.

C. *Military Leadership and Training*

1. All VWIL students will be required to complete four years of ROTC. The program at MBC will be conducted by ROTC professors from VMI. Academic classes will be conducted on the MBC campus by the ROTC faculty, who are active duty military personnel. The content and design of the courses are uniformly directed for all ROTC by the respective Armed Service. In addition to classes, organized laboratory activities will be conducted on designated afternoons either on the MBC campus or at the ROTC facilities on the VMI campus. MBC will provide transporta-

tion to and from the VMI campus. Juniors and Seniors who are not candidates for a commission will be required to participate in alternative leadership laboratory activities. Physical training and evaluation activities separate from those directed by the Physical Education Department will be conducted by the ROTC faculty, and the ROTC faculty will provide counseling and advising on the MBC campus on a scheduled basis. Defs.' Ex. 39 at 10.

2. The total number of semester hours credit for four years of ROTC is 12. In addition, a six week intensive summer camp between the junior and senior years will provide externship credit for students seeking a commission. Defs.' Ex. 39 at 11.

3. VWIL students will constitute a corps of cadets. They will have military rank, will wear uniforms and will drill in ROTC and as part of the Virginia Corps of Cadets. Nothing in the VWIL Plan precludes increasing the amount or type of military exercises. Tr. 118-21; 159 (Lott).

4. The Plan provides for establishment of a Virginia Corps of Cadets, comprised of the all-female VWIL, the all-male VMI and the coed Virginia Tech Corps. Defs.' Ex. 11 at 17-18. As members of the Virginia Corps of Cadets, VWIL students will have distinctive military uniforms, different from the ROTC uniform. Tr. 105 (Lott).

5. The Governor of Virginia will be the Commander in Chief of the Virginia Corps of Cadets. The Virginia Corps of Cadets will participate in parades and perhaps field exercises and other activities. Tr. 670 (Sgro).

6. For approximately one week each summer VWIL freshmen must participate in a "cadre week orientation." Plan at 11.

7. VWIL students will not be required to wear uniforms during the school day other than while participating in ROTC or Virginia Corps of Cadets activities. TR 166, lines 15-19 (Lott); TR 409, lines 7-12 (Tyson).

8. Traditional MBC students would not wear military uniforms. TR 166, lines 20-23; 167, line 1 (Lott).

9. VWIL students will not be required to eat meals together. TR 407, lines 21-23; 408, lines 1-7 (Tyson).

D. *Physical Education and Training*

1. VWIL students must take 8 semesters of physical and health education courses. Defs.' Ex. 39 at 8. These courses are: advanced fitness ("a course designed for VWIL students"); swimming; tennis; golf; racquetball; and "additional physical education courses, and two health courses." Defs.' Ex. 39 at 9.

2. In the sophomore, junior and senior years students will take tennis, golf, racquetball, additional physical education courses, and two health courses. A course in self-defense will be part of the curriculum, and all VWIL students will have training in self-defense and self-assertiveness through a Cooperative Confidence Building program ("CCB") and through the required weekend workshops which will make up an important part of the co-curricular component of the Institute. Defs.' Ex. 39 at 9.

3. All VWIL students will complete a battery of fitness assessments at the beginning of the Freshman year and at the end of all subsequent semesters. The Physical Education faculty will establish a set of

standards with appropriate recommendations for a standard of maintenance. The results of the tests will be incorporated into the evaluation of the VWIL student in the health or physical education course she is taking during that semester. Defs.' Ex. 39 at 8-9.

4. The VWIL physical education program will have a self-defense component rather than a boxing component. Tr. 1442 (Davis).

5. VWIL will require tennis, golf and racquetball because, according to the Task Force, these sports are popular among corporate leaders. Tr. 107 (Lott).

6. The MBC Physical Education Department will develop the CCB as a co-curricular component. CCB will be held twice a week. The CCB was designed to be analogous to the VMI "rat challenge," and will consist of physically and mentally challenging events, including obstacle courses, rappelling, a ropes course, and team building activities. Students enrolled in VWIL will be required to participate in this program their freshman year, unless they are involved with practice for a varsity athletic team. Sophomores, juniors and seniors who are not involved with practice for a varsity team will have the choice of participating in the CCB program as leaders or participating in a personal workout program. The latter will be designed to assure that the student meets and maintains the standard of physical fitness determined by the Physical Education faculty. Defs.' Ex. 11 at 11.

7. The physical training test for women in VWIL is designed to be comparable in rigor and challenge to the physical training test for men at VMI. Tr. 178 (Lott). The VWIL physical and health education component is based on the VMI physical education program. Tr. 106 (Lott).

8. The VWIL Program's physical training component will produce women who are capable of serving physically in the military service. Tr. 443 (Anderson).

9. Physical performance standards will be set by MBC's physical education faculty in consultation and cooperation with the physical education faculty at VMI. National norms and standardized tests for physical fitness will be utilized. The ROTC physical fitness requirements for women are standardized nationwide. Tr. 109, 160 (Lott).

10. Sharon Spalding, a member of the Physical Education Department at Mary Baldwin College, holds a certification as an Exercise Specialist from the American College of Sports Medicine. That certification demonstrates the expertise to design, implement and evaluate a physical education and physical training program. Tr. 1403-04 (Davis).

11. The VMI Physical Education Department possesses the attitude, the resources and an avowed desire to assist MBC in any way appropriate in implementing a comparable program at MBC. Both departments are committed to the VWIL Program. Both departments desire to put in place the comparable program at MBC, as demonstrated by the VWIL requirement of eight semesters of physical education, which is unique in undergraduate education. The two staffs working together have the ability to design, implement and evaluate the VWIL Program so that it will be comparable to VMI's. Tr. 1404-05 (Davis).

12. VMI will make the Rat Challenge facilities available to VWIL. Tr. 1134-35 (Peterson).

E. *Co-Curriculum*

1. VWIL students will be required to participate in a one-week wilderness-type orientation the summer before their freshman year. The VWIL Orientation will take place the week before regular orientation and will be run by upper class VWIL students. The Orientation will give upper class students the opportunity to plan, to organize, and to lead; and it will provide freshman with a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself. Defs.' Ex. 39 at 12.

2. Freshmen VWIL students will room together and will be housed in separate sections of freshman halls to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen. Freshmen will be subject to a number of rules which will provide an externally imposed order on their daily lives. While the regulations are still being developed, they will include the following: Students will be required to keep their rooms neat (and subject to spot inspection); they will not be allowed to smoke in their rooms; they will not be allowed to change roommates during the first year but will instead be expected to work through any interpersonal problems which arise. They will also have a required study hall from 7 to 9:00 Monday through Thursday. Defs.' Ex. 39 at 12-13.

3. Freshmen VWIL students will take many of the same academic courses, will have the same physical education and ROTC experiences, and will work together in teams in the CCB. Defs.' Ex. 39 at 13-14.

4. As MBC students, VWIL participants will be encouraged to participate in MBC activities and class

functions, and will be subject to the rules and regulations of the Honor System and the Judiciary System. Defs.' Ex. 39 at 13-14.

5. Throughout the Freshman year, students will be mentored by upper class VWIL students, and, as VWIL develops, the upper class students will play an important role in modifying the design of the freshman year to make it as effective as possible in orienting first year VWIL students to the standards and expectations of the Institute. Upper class students will lead the VWIL contingent of the Virginia Corps of Cadets, will organize and direct the Corps drills, will be responsible for enforcing regulations and maintaining *esprit de corps*, and will play a central role in the VWIL orientation and in the CCB. Defs.' Ex. 39 at 14.

6. After the Freshman year, VWIL students will be required to live for at least one year in the VWIL House, a residence hall which will also be the center for VWIL meetings and activities: determination of the required residence period in the VWIL House will be made on the basis of program enrollment and VWIL's experience with balancing the considerations of segregation and integration described below. VWIL House residency will provide students with a "lab" for community building and leadership development. VMI Defs.' Ex. 39 at 15.

F. *VWIL/MBC Residence Life*

1. Rejecting both total segregation and total integration, therefore, the Task Force developed a model which will allow VWIL students to move in productive ways between the "walls" of VWIL and the MBC community. Defs.' Ex. 39 at 12.

2. Upper class VWIL students will be required to live for at least one year in the VWIL House. Defs.' Ex. 39 at 14. The VWIL House will not be operated on a military format. TR 413, lines 19-21 (Tyson). No regulations or requirements have been developed for the VWIL House. Tr. 413, lines 9-15 (Tyson).

3. VWIL students will set their own rules and regulations in the VWIL House, within the larger framework provided by the VWIL code of conduct. Tr. 356 (Wilson).

4. Upper class VWIL students will play the role of mentor and monitor of the freshmen students. Upper class students will orient freshmen and teach them the standards and expectations of VWIL. Tr. 114-15 (Lott).

5. VWIL will have a class system, including the mentoring system, in which upper class students teach and mold freshmen. Tr. 1052-53 (Conrad); 114 (Lott).

6 VWIL residential regulations will be enforced and monitored by upper class students in the program. Tr. 335 (Wilson).

7. Upper class students will lead the VWIL contingent of the Virginia Corps of Cadets, organize and direct the corps' drills, be responsible for enforcing regulations, maintaining esprit de corps and play a central role in the VWIL orientation and the confidence building program. Tr. 114-15 (Lott); Defs.' Ex. 39 at 14.

G. *VWIL's ROTC Component*

1. The ROTC programs at VMI operate independently of the barracks system and its various components such as the rat line, and nothing about the

ROTC programs at VMI is unique to VMI other than the absence of women. *United States v. Virginia*, 766 F.Supp. at 1424 (Findings III.G.3 and 4).

2. All military training for VWIL students will be mandatory for four years, including participation in ROTC. Tr. 105 (Lott).

3. For VWIL students, military training leading to the opportunity to be commissioned in the armed services will be provided by the ROTC program in which all VWIL students will be required to enroll. The courses in ROTC will be taught at MBC, and the labs in ROTC will be held at MBC. The exceptions to ROTC activities at the MBC campus will be the use of facilities which MBC does not have (for example a rifle range). Tr. 104-05 (Lott).

4. The purpose of ROTC is to combine quality undergraduate education with tough, centralized training focusing upon duty, honor and leadership development. Tr. 567 (Wagner).

5. Army ROTC training is standardized, both on campus and off campus, including summer camp. Tr. 568 (Wagner).

6. At the highest levels, there are similarities among the Army, Navy and Air Force ROTC programs, especially in the kind of leadership that the programs seek to achieve in their graduates. Tr. 560-61 (Wagner).

7. The principles of leadership are the same in all the services. Tr. 565 (Wagner).

8. Army, Air Force and Navy ROTC physical fitness standards and tests are standardized nationwide. Defs.' Exs. 29, 30, 32.

9. The Army ROTC summer camp is a very important training experience that occurs between the

junior and senior year in which cadets are put under a regime that rivals Ranger school. Tr. 568 (Wagner).

10. The ROTC program at summer camp does not include an adversative training methodology like the VMI rat line, nor is that methodology necessary to achieve the objectives of Army ROTC. There is no yelling at ROTC cadets to induce stress. Tr. 581-82, 570-71 (Wagner).

11. It is not necessary for a college ROTC student to wear a uniform around the clock to become a successful military leader. Tr. 596 (Wagner).

12. It is not necessary for a college ROTC student to go through a rat line experience comparable to that at VMI to become a successful military leader. Tr. 596 (Wagner).

13. It is not necessary for a college ROTC student to live in a barracks operated with a system comparable to VMI to be successful military leaders. Tr. 596 (Wagner).

14. The majority of officers in the Army are liberal arts majors. The majority of Army platoon leaders, battalion commanders, division commanders who fought in Desert Storm were liberal arts majors. Tr. 580-81 (Wagner).

15. VWIL students will wear ROTC uniforms at designated times. VWIL students will also wear uniforms, different from ROTC uniforms, as part of the Virginia Corps of Cadets at designated times. Tr. 104-05 (Lott).

16. For academic years 1991, 1992 and 1993, there were respectively, a total of 3,924, 3,703 and 3,613 college ROTC cadets enrolled in coeducational residential military corps of cadets. Of these, 234, 222 and 232 were females, respectively. Defs.' Ex. 88.

17. Through the six senior military colleges, four of which are coeducational, for FY 92 and FY 93, the Army commissioned a total of 310 and 302 ROTC cadets, respectively, of which 19 and 8 were females, respectively. Defs.' Ex. 89.

18. For FY 92 and FY 93, the Army commissioned, respectively, a total of 4,699 and 4,284 ROTC cadets from civilian and military college programs, of which 791 and 665 were female, respectively. Defs.' Ex. 89.

19. Army ROTC Cadets are assessed by the Army Accession Board between their junior and senior years. Evaluation packets for each cadet are prepared by the cadet's professor of military science, and concern three general evaluation areas: military performance, academic performance and, very importantly, the recommendation of the professor of military science. Tr. 572 (Wagner).

20. VMI ROTC students scored an average of 35.45 for the period 1988 through 1993 on Accession Board scores. ROTC students from all other colleges or universities scored an average of 35.98. Thus, VMI ROTC students scored marginally below the average for all other colleges and universities on ROTC Accession Board scores for this period. Tr. 579 (Wagner); Defs.' Ex. 89.

21. Women ROTC graduates from military colleges during the period FY 88 to FY 93 scored an average of 36.5 on ROTC Accession Board scores. Women ROTC graduates from all other colleges and universities (civilian) scored an average of 36.1 on ROTC Accession Board scores. The difference is not statistically significant. Tr. 579 (Wagner); Defs.' Ex. 89.

22. Women ROTC graduates from Texas A & M, a military college, performed no better on Accession Board scores than women who went to the University of Virginia, a civilian university. Tr. 578 (Wagner).

H. *Endowment*

1. MBC's endowment is $20.5 million. Tr. 1543-44 (Bunting).

2. The VMI Foundation will endow the VWIL program with a permanent endowment of $5.4625 million in addition to its other financial contributions. A comparison of MBC's endowment with similar institutions indicates that MBC has an above average endowment. For example, the endowment of Mary Washington College is $15 million. Tr. 1481 (Finley); the endowment of James Madison University is approximately $9 million. Tr. 1481 (Finley); and, the endowment of Radford University is $6 million. Tr. 1481 (Finley).

I. *VWIL Access to VMI Alumni Network*

1. The VMI Alumni Association has pledged to support MBC and the MBC Alumni Association with respect to VWIL graduates. Tr. 459-60 (Maini); Defs.' Ex. 7.

2. To assist the VMI Admissions Office, the VMI Alumni Association maintains an alumni recruiting network designed to educate young people about the benefits of a VMI education. The VMI Alumni Association will do likewise with respect to VWIL. For example, on college nights where VMI's alumni serve as volunteers, they will provide prospective VWIL students with information about VWIL's military

leadership education or advise young women how to obtain it. Tr. 460-61 (Maini); Defs.' Ex. 11-I.

3. Since 1988, the VMI Alumni Association has assisted VMI alumni who find themselves unemployed. The Association has developed a network of business owners, corporations, VMI graduates and non-graduate employers who are interested in hiring VMI graduates. The Alumni Association will make this placement service available to VWIL graduates. Tr. 461-62 (Maini).

4. The VMI Alumni Association publishes a placement newsletter monthly. The newsletter includes all people the Association knows of who are seeking employment. The newsletter is mailed to the members of the placement network in the hope that employers will identify graduates who fit their needs. With the increase of the job opportunities available to women the demand by VMI alumni employers will increase. VWIL graduates will have the same access to the VMI placement network as VMI graduates. Tr. 462-63 (Maini).

5. The VMI Alumni Association has presented a commitment in which it agrees to open its networks to the women who are graduates of VWIL and to insure that they have opportunities available through those networks, as well as opportunities for externships. This commitment will provide opportunities for advancement to VWIL graduates. Tr. 421-24 (Tyson).

6. The relationship contemplated by the two alumni associations is a strong partnership of mutual support and cooperation. The attitude of VMI alumni toward VWIL is extremely supportive. They are committed to making VWIL work. Tr. 464-65 (Maini).

7. The VMI Alumni Association is opening its network to VWIL graduates, providing them with access to leadership positions. Tr. 374-75 (Tyson).

V. MARY BALDWIN COLLEGE (MBC)

A. *History/General Background*

1. MBC was founded in 1842. Under the leadership of Mary Julia Baldwin. Miss Baldwin enlisted the educator and textbook author Dr. Williams Holmes McGuffey to develop a program of study for women patterned on the curriculum of mathematics, classics and science offered to men at the University of Virginia. Tr. 67-68 (Lott); Defs.' Ex. 69 at 1.

2. MBC possesses those characteristics of single-sex schools that lead to beneficial outcomes praised by the United States Department of Education in its recent study of single-sex schools. Defs.' Exs. 128, 129.

3. MBC has a chapter of *Phi Beta Kappa* and was the first women's college to be granted a circle of *Omicron Delta Kappa* Society, which honors leadership, service and scholarship. Defs.' Ex. 11-A at 5, Plf.'s Ex. 27.

4. In the late 1960's and early 1970's, MBC responded to the women's movement. The college broadened its curriculum to include the new options open to women in business and the professions and developed an emphasis on career planning. Defs.' Ex. 11-A at 6, Plf.'s Ex. 27.

5. MBC is committed to the education of women for a world of expanding opportunity. The College has computerized the campus, renovated its main classroom building to enhance the learning climate, developed new facilities for the communications and

computer science disciplines and purchased new state of the art equipment for its science labs. It has established the Rosemarie Sena Center for Career and Life Planning. Defs.' Exs. 11-A at 7-8, Plf.'s Ex. 27.

6. MBC is accredited by the Southern Association of Colleges and Schools. The last re-accreditation occurred in the academic year 1987-88. Tr. 70 (Lott).

7. There are 1,327 students currently enrolled in courses offered by MBC. Approximately 600 students are traditional undergraduate residential women students. About 50 students are enrolled in the Program for the Exceptionally Gifted (PEG), a residential program for academically gifted high-school age girls who are talking college-level work. Approximately 60 students are enrolled in the coeducational non-residential Master of Arts in Teaching program. About 25 students are enrolled in the Extension Program in Goochland, Virginia. Approximately 600 students are enrolled in the coeducational Adult Degree Program (ADP) which is a non-residential program conducted at branch facilities. Tr. 71-72 (Lott); Defs.' Ex. 69 at 2.

8. MBC has 73 full-time faculty and approximately 40 part-time faculty. Approximately 44% of the faculty are tenured. The student/faculty ratio in the traditional program is eleven to one. Tr. 72 (Lott).

9. MBC offers 28 undergraduate majors in the arts, sciences, business and mathematics. Tr. 72 (Lott); Defs.' Ex. 11-A at 10-11, Plf'.s Ex. 27. Currently, about 15% of MBC students major in mathematics or science. Tr. 158 (Lott). MBC also offers pre-law, pre-med and teacher education. Defs.' Ex. 69 at 1.

10. MBC offers an engineering degree program in cooperation with Washington University in St. Louis. Students spend three years at MBC and two years at Washington University to complete the requirements for a Bachelor's degree in engineering. Tr. 101 (Lott); 1614-16 (Bunting); Defs.' Ex. 11-A at 12, Plf.s Ex. 27.

11. MBC requires an externship of every student equivalent to three semester hours. Faculty and the Director of the Sena Career Center assist in setting up externships and establishing guidelines to maximize the experiential education. Tr. 100-01 (Lott); Defs.' Ex. 11-A at 10.

12. MBC's NCAA intercollegiate athletic program includes basketball, swimming, field hockey, lacrosse, volleyball and tennis. MBC offers fencing, soccer, track, softball and riding as club sports. Defs.' Ex. 11-A at 152.

13. The residence life philosophy of MBC is that students learn not only from the classroom but from each other in the residence halls which are extensions of the classroom. The residential life is designed to provide an experience in flexibility, creativity, accountability and compassion with goals of personal growth and development and self-responsibility in the living community. Students run the residence halls, making their own rules and regulations within the larger framework of MBC's code of conduct, and with the guidance of staff. Freshmen have far less autonomy than upper class students. Tr. 356-57 (Wilson); Defs.' Exs. 67 at 1, 82.

14. More than 150 leadership positions are available to the women of MBC through student government, residence halls, class offices, interest groups and athletics. Defs.' Ex. 11-A at 151.

15. The average combined SAT score of MBC entering freshmen is approximately 930. The VMI Defendants' Objections and Responses to the United States of America's First Set of Interrogatories on Remand at 23 (¶ 38) and 24-25 (¶ 42) (filed 10/22/93); Tr. 303-07 (Fox-Genovese); 653-54 (Richardson). This approximately 100 point differential from VMI is within 30 points of the national average differences between young women and young men. Tr. 1544-45 (Bunting).

16. MBC has been listed among the top ten liberal arts colleges in the Southeast four times in the last eight years by *U.S. News and World Report.* The magazine uses a quantitative methodology and makes its comparison based on five measures: reputation based on a survey of 2,600 college presidents, deans and admission officers nationwide; financial resources, including educational and general expenditures per student, and endowment; selectivity, including SAT scores and acceptance percentage; faculty resources, including faculty preparation; and graduation rates. Tr. 1373-74 (Askegaard); 1618 (Bunting); Defs.' Ex. 125. MBC also has been listed in *Best Buys in College Education,* published by the *New York Times.* Tr. 1374 (Askegaard).

17. MBC has a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community. For example, the Program for the Exceptionally Gifted (PEG) was introduced in 1984. PEG is a unique residential program for academically gifted, high school age girls. Over fifty students are presently enrolled in the program and reside together in a separate residence hall with its own regulations. The program is unique in that it is

the only early college program in the United States that acknowledges the academic, emotional and developmental needs of young women. The traditional MBC residential program has proven a compatible and supportive setting for PEG. Defs.' Exs. 69 at 2, 78.

18. Mary Baldwin College is not a military school. Tr. 399, lines 17-19 (Tyson).

19. Mary Baldwin has no tradition of producing military leaders, or of training its students for the military. Tr. 146, lines 10-12; 149, lines 16-17 (Lott); Tr. 406, lines 2-5 (Tyson); Tr. 584, lines 21-23; 585, lines 1-8 (Wagner).

20. ROTC is currently available to Mary Baldwin College students through the program at James Madison University, although in the past three years no MBC student has been commissioned.

21. Currently, there is one MBC student participating in ROTC. Plf.'s Ex. 39 at 117; Tr. 405, lines 2-4, lines 18-19 (Tyson); Defs.' Response to U.S. First Set of Interrogs. on Remand, No. 22 (10/22/93).

22. MBC is already geared in the direction of trying to encourage women to persist in math and physics. Tr. 478-79 (Riesman).

23. Neither MBC nor VMI is a research institution. They are institutions whose missions are to educate; they are fundamentally pedagogical in that they focus on teaching, rather than research. Tr. 244-45 (Fox-Genovese).

B. *MBC Facilities*

1. MBC has a 55-acre campus in Staunton, Virginia for its undergraduate residential program for women. The campus includes the facilities of the former Staunton Military Academy ("SMA"), which

MBC purchased in the late 1970's. Tr. 134-35 (Lott); Defs.' Ex. 11-A at 6.

2. There are sixteen residence halls on the Mary Baldwin campus, which together house about 650 students. Students have a wide range of living arrangements from which to choose, including traditional residence halls, college-owned apartment buildings, and converted single-family dwellings. Tr. 825, lines 3-10 (Brewer); Plf.'s Ex. 39 at 147-148.

3. The traditional residence halls house from about 40 people to about 160 people, and no two residence halls are alike. Each has different room configurations, room sizes, capacities and decor. Residence halls are elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture. Tr. 826, lines 12-23 (Brewer); Plf.'s Ex. 43 at 4.

4. About half of Mary Baldwin's residence halls are converted single-family homes, which are located on campus or in the residential areas immediately adjacent to the campus. Each houses from five to sixteen students, has its own distinct character, and is completely furnished by the college. Tr. 825, lines 8-11; 827, lines 13-23—Tr. 828, line 1 (Brewer).

5. There are also two theme houses—"special interest houses"—for upperclass students, one for honors students and one for community volunteers, both of which are equipped with televisions, cable hookups and microwave ovens. Plf.'s Ex. 43 at 6; Plf.'s Ex. 39 at 148.

6. MBC provides a wide variety of options to students who wish to entertain male visitors. Six residence halls have "unrestricted" or 24-hour visitation, with 72-hour overnight visitation for males visiting Mary Baldwin students. Six residence halls have

"unrestricted" weekends (Friday 1:00 p.m. to Sunday 11:30 p.m.) and "regular" hours weekdays (Monday-Thursday 5:00 p.m. to 11:30 p.m.). The remaining have regular hours with more limited weekend privileges. Plf.'s Ex. 39 at 148; Plf.'s Ex. 43 at 6-7.

7. About 18 percent of the rooms on the Mary Baldwin campus are single rooms. Tr. 827, lines 6-9 (Brewer).

8. At MBC, the largest bathroom serves approximately 35 or 40 students. At VMI there is one bathroom on each stoop, serving up to 400 students.

9. At MBC, each shower or tub has a door or curtain, while at VMI there are gang showers containing about 24 heads.

10. At MBC, each residential room has a solid door with a lock. At VMI the barracks rooms doors have windows and are unlocked. Tr. 830, lines 13-22—Tr. 831, lines 1-14 (Brewer).

11. Tullidge Hall, a SMA barracks, is one of the residence halls which may be used for the VWIL program. It can house approximately 50 students. Tr. 137 (Lott). MBC has capacity for 100-150 additional residential students. Defs.' Ex. 11 at 12.

12. The Pearce Science Center has 32 laboratories. Tr. 138 (Lott).

13. MBC provides a total of eight computer laboratories with more than 100 individual student computers on campus. Tr. 138 (Lott).

14. The MBC Physical Activities Center is a 40,000 square foot physical education facility which includes four racquetball courts, two gymnasiums, locker rooms, a fully-equipped weight training room, fencing facility and athletic training room. Outside are several playing fields. The King Building houses

a gymnasium and swimming pool. Swimming facilities are available also in the olympic-size pool at the Staunton Racquet Club, three blocks from campus. There are a dozen lighted tennis courts. Tr. 139-40 (Lott).

V. VMI

For a Complete record of the Findings of Fact regarding VMI, see this Court's opinion at 766 F.Supp. 1407. Those findings of fact were affirmed by the Fourth Circuit at 976 F.2d 890.

VI. DIFFERENCES BETWEEN VWIL AND VMI

A. *Faculty*

1. MBC maintains a faculty holding significantly fewer Ph.D.'s than the faculty at VMI. While 86% of VMI's faculty holds Ph.D.'s, 68% of MBC's faculty hold such degrees. Tr. 768 (Leslie).

B. *Endowment*

1. In fiscal year 1989-90, the VMI fund and plant revenues reflect the amount of approximately $4,751,310 from the VMI Foundation. Stip. 207. The Foundation completely funds the VMI Keydet Investment Club which is a $200,000 academic program. Stip. 209.

2. Direct aid and support to VMI by the VMI Foundation and affiliated agencies for 1987-88 totalled $6,765,859; for 1988-89 totalled $7,225,755; and for 1989-90 totalled $7,703,775. Ans. to Int. 15, the VMI Foundation, Inc. and VMI Alumni Association's Responses to the Second Set of Interrogatories Propounded by the United States (12/11/90) at 17-18.

3. MBC has an endowment of approximately $19 million, VMI has the largest endowment on a per student basis than any other undergraduate institution in the nation—$131 million. Tr. 770 (Leslie). There is also a difference in the projected endowments of the two institutions based on future commitments; whereas VMI will add an additional $220 million dollars thrcugh these commitments, MBC will add $35 million. Tr. 770 (Leslie).

C. *Physical Training Facilities*

1. MBC has seven tennis courts and two multi-purpose fields for field hockey, lacrosse, and soccer. One gymnasium contains a basketball court, four racquetball courts, a weight room, a billiard and ping-pong room, and a multipurpose room that is used for areobics, dancing and fencing. Tr. 837 (Brewer).

2. VMI, on the other hand, has eight tennis courts; an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacross fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track. Tr. 839, Tr. 840 (Brewer).

3. Mary Baldwin's basketball court, similar to a high school gym, seats approximately 400-500. VMI has four basketball courts, including one facility that contains television hook-up capability and seats approximately 5,000. Tr. 838 (Brewer).

4. VMI's weight room has twice the number of stations and is probably between three and four times

the size of the weight room at Mary Baldwin. Tr. 839 (Brewer).

D. *Academic Programs*

1. VMI offers undergraduate degrees in liberal arts, the sciences and engineering. Stip. 115. VMI has one of only five engineering programs in the Commonwealth of Virginia that are accredited by the Accreditation Board of Engineering and Technology, Inc. Stip. 117.

2. Mary Baldwin College does not offer a bachelor of science degree. Tr. 156 (Lott). Mary Baldwin College does not offer engineering on campus. Tr. 157 (Lott). MBC does not have a math and science focus; only about 15% of all current MBC students major in math or science. Tr. 157, Tr. 158 (Lott). VWIL students who wish to earn a degree in engineering must travel to Washington University in St. Louis, Missouri to obtain it. Tr. 101, 157 (Lott).

3. VWIL students interested in obtaining an engineering degree through the cooperative program with Washington University would not receive the tuition discount during their two years in St. Louis; they would have to pay the private tuition fees that are required and thus would be denied the opportunity to receive an engineering degree on a publicly-supported basis like VMI students. Tr. 696, Tr. 697 (Sgro).

APPENDIX C

SUPREME COURT OF THE UNITED STATES OF AMERICA

No. 92-1213

VIRGINIA MILITARY INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES

Case below, *United States v. Com. of Va.*, 766 F. Supp. 1407; 976 F.2d 890.

On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

May 24, 1993. The petition for a writ of certiorari is denied.

Opinion of Justice SCALIA respecting the denial of the petition for writ of certiorari.

Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself. This present petition, however, seeks our intervention before the litigation below has come to final judgment. The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy. It expressly declined to rule on the "specific remedial course that the Commonwealth should or must follow hereafter," and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy. *United States v. Virginia*, 976 F.2d 890, 900 (CA4 1992).

We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. See, *e.g.*, *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384, 13 S.Ct. 758, 763, 37 L.Ed. 486 (1893); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 438, 19 L.Ed.2d 560 (1967) (*per curiam*); see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986). I think it prudent to take that course here. Our action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered. See, *e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-259, 36 S.Ct. 269, 271-272, 60 L.Ed. 629 (1916); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-366, n. 1, 93 S.Ct. 647, 650, n. 1, 34 L.Ed.2d 577 (1973); Stern, Gressman, & Shapiro, *supra*, § 4.18, at 226; 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 32 (2d ed. 1988).

Justice THOMAS took no part in the consideration or decision of this petition.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1690

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

COMMONWEALTH OF VIRGINIA; LAWRENCE DOUGLAS WILDER, Governor of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, BRIG. GEN.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, Members of the Board of Visitors of Virginia Military Institute; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION, DEFENDANTS-APPELLEES

and

GORDON K. DAVIES, Director of the Virginia State Council of Higher Education; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION and its Members and Officers, DEFENDANTS

VIRGINIA WOMEN ATTORNEYS ASSOCIATION; VIRGINIA CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; VIRGINIA CHAPTER OF THE OLDER WOMEN'S LEAGUE; VIRGINIA FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INCORPORATED; FRIENDS OF VMI FOR EQUALITY; ALEXANDER W. ASTIN; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA; NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; CENTER FOR WOMEN POLICY STUDIES; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND, AMICI CURIAE

Argued Apr. 8, 1992

Decided Oct. 5, 1992

On Petition for Rehearing with Suggestion for Rehearing In Banc Nov. 19, 1992

Before PHILLIPS and NIEMEYER, Circuit Judges, and WARD, Senior District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

NIEMEYER, Circuit Judge:

The male-only admissions policy of Virginia Military Institute (VMI), a state institution of higher education located in Lexington, Virginia, is challenged by the federal government under the Equal Protection Clause of the Fourteenth Amendment and the jurisprudence of *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Fd.2d 1090 (1982). The government contends that the school's policy discriminates against women and is not substantially related to the achievement of an important governmental objective.

Following a six-day trial and extensive findings of fact, the district court concluded that VMI's male-only policy "is fully justified" by a generally accepted benefit of single-sex education, and that the admission of women would "significantly" change the "methods of instruction and living conditions" at VMI. Having concluded that "diversity in education" was a legitimate state interest, the district court summarized, "I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission." 766 F.Supp. 1407, 1411-13 (W.D.Va.1991).

The United States contends on appeal that enhancing diversity by offering a distinctive single-sex education to men only is not a legitimate state objective and that the Commonwealth and VMI have not established a sufficient justification for VMI's male-only admissions policy.

For the reasons that we give more fully below, we accept the district court's factual determinations that VMI's unique methodology justifies a single-gender policy and material aspects of its essentially holistic system would be substantially changed by co-education. Moreover, all parties appear to acknowledge, as did the district court, the positive and unique aspects of the program. The Commonwealth of Virginia has not, however, advanced any state policy by which it can justify its determination, under an annouced policy of diversity, to afford VMI's unique type of program to men and not to women.

Because Virginia has failed to articulate an important objective which supports the provision of this unique educational opportunity to men only, we vacate the judgment of the district court and remand the case to the district court to require the Commonwealth of Virginia to formulate, adopt, and implement a plan that conforms to the principles of equal protection discussed herein. We do not, however, order that women be admitted to VMI if adequate alternatives are available.

I

VMI was established by the Virginia legislature in 1839 as a four-year military college, and its graduates have distinguished themselves in the 150 years since. A VMI professor, Thomas "Stonewall" Jackson, achieved notoriety as a confederate general during the Civil War. The VMI cadet corps fought Union troops at New Market, Virginia, and almost 1800 almuni (constituting 94% of all VMI graduates at the time) fought in the Civil War. Among the thousands of alumni who have served this country during

war is General of the Army George C. Marshall, and six have been awarded the Congressional Medal of Honor. VMI graduates have achieved similarly in civilian life. The school's success and reputation are uncontroverted in this case. Indeed, it is apparently that very success in producing leaders that has made admission to VMI desirable to some women, prompting the government to challenge the policy of excluding women.

VMI is financially supported by the Commonwealth of Virginia and remains "subject to the control of the [Virginia] General Assembly." Va.Code Ann. § 23-92. It is governed by a Board of Visitors, which the Commonwealth expressly charges with prescribing "the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va.Code Ann. § 23-104.

The 15 state-supported institutions of higher learning in Virginia,[1] including VMI, are generally supervised and coordinated by the State Council of Higher Education for Virginia. While the Virginia General Assembly assigns various responsibilities to the Council of Higher Education, including the responsibility "to review and approve or disapprove of any proposed change in [an existing institution's] statement of mission," it delegates to each institution the right

[1] In addition to VMI, the list includes: Christopher Newport College, Clinch Valley College, The College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, and Virginia State University.

to modify its mission and to establish admissions criteria. *See* Va.Code Ann. § 23-9.6:1(2).

The mission of VMI is to produce "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary."[2] Focusing primarly on character development and leadership training through a unique and intense process, characterized as an "adversative" educational model drawn from earlier military training and English public schools, VMI's educational method emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values. The process is designed to foster in VMI cadets doubts about previous beliefs and experiences and to instill in cadets new values which VMI seeks to impart. The model employs a hostile, spartan environment that is characterized by six in-

[2] As stated in the final report of the Mission Study Committee of the VMI Board of Visitors, dated May 16, 1986:

> The Virginia Military Institute believes that the measure of a college lies in the quality and performance of its graduates and their contributions to society.
>
> Therefore, it is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American Democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.
>
> To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

terrelated components—the "rat line," the class system, the "dyke" system, the honor code, the barracks life, and the military system.

The *rat line* refers to the harsh orientation process to which all new cadets ("rats") are subjected during their first seven months at VMI. Designed to be comparable to the Marine Corps' boot camp in terms of physical rigor and mental stress, the rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills. The *class system* entails the peer assignment of privileges and responsibilities, including supervisory roles, to classes of cadets based on rank. The *dyke system*, which is "closely linked" with the rat line, assigns each rat to a first classman, who acts as a mentor ("dyke") to relieve some of the stress generated from the rat line. The dyke system aims to create cross-class bonding and provide a model for leadership and support. The *honor code*, that a cadet "does not lie, cheat, steal nor tolerate those who do," is a stringently enforced code of conduct applying to all aspects of life at VMI and providing the single penalty of expulsion for its violation. The *barracks life*, described as important to VMI's ethos of egalitarianism, is dictated by the nature and functioning of the barracks. Each class is assigned to one floor of the four-story barracks structure and three to five cadets are assigned to a room. The rooms are stark and unattractive. There are no locks on the doors and windows are uncovered. Access to bathrooms is provided by outside corridors visible to the quadrangle, and there is a total lack of privacy in the barracks, where cadets are subjected to constant scrutiny and minute regulation, all intended to foster cadet equality and to induce

stress. Finally, the *military system*, providing regulation, etiquette, and drill, pervades life at VMI. As part of the military system each cadet must participate in an ROTC program throughout his four years. The district court found that the various systems in place at VMI are integrated and interdependent, and several of them cannot be changed without materially affecting others.

VMI, with approximately 1,300 male students, has never accepted applications from women. During the two years preceding the filing of this action, it did, however, receive over 300 inquiries from women. Today, VMI is the only state-supported, single-sex college in Virginia, although historically most of Virginia's 15 public colleges were at one time single-sex institutions.

The government instituted this action on March 1, 1990, under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, on behalf of a female high school student who desired admission to VMI, contending that VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. The suit named as defendants the Commonwealth of Virginia; its governor, Lawrence Douglas Wilder; VMI and its Board of Visitors and top officers; and the State Council of Higher Education for Virginia, its members and its Director.[3] The action sought an order enjoining discrimination based on sex and requiring the defendants "to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices."

---

[3] The VMI Foundation, Inc., and the VMI Alumni Association, neither of which is a state agency, were allowed to participate in the litigation as intervenors.

In his answer to the complaint, Governor Wilder stated that "the failure to admit females to [VMI] is against his personal philosophy," and "no person should be denied admittance to a state supported school because of his or her gender." On his assurance that he would "abide by the decision of the Court," Governor Wilder was given permission not to participate in the litigation.

As the result of Governor Wilder's position and because of the conflict between the Governor, the Commonwealth, and VMI, the Attorney General of Virginia was granted leave to withdraw from representation of any party. She stated in a letter to the Governor,

> You have indicated that VMI's admission policy serves no legitimate public policy objective. . . . In the absence of a statute explicitly expressing the General Assembly's view on the policy issue, your statement of the Commonwealth policy is persuasive.

As a result, the Commonwealth obtained *pro bono* counsel, who then sought and obtained on behalf of the Commonwealth a stay of proceedings against it during the liability phase of litigation, on the condition that it abide by the court's liability determination. Accordingly, the Governor and the Commonwealth did not participate in the liability determinations, which by agreement include this appeal.

II.

The district court began its opinion by noting that in May 1864, during the Civil War, VMI cadets bravely fought Union troops at New Market, Virginia. The court continued, "the combatants have

again confronted each other, but this time the venue is in this court." What was not said is that the outcome of each confrontation finds resolution in the Equal Protection Clause. When the Civil War was over, to assure the abolition of slavery and the federal government's supervision over that policy, *all* states, north and south, yielded substantial sovereignty to the federal government in the ratification of the Fourteenth Amendment, and every state for the first time was expressly directed by federal authority not to deny any *person* within the state's jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1. The government now relies on this clause to attack VMI's admissions policy.

The obvious appeal to fairness in requiring the equal application of law too often becomes entangled with generalized notions of equality as referred to in Lincoln's Gettysburg Address [4] and, before that, the Declaration of Independence,[5] and these generalizations tend to overwhelm the difficult task of deciding what is meant by equal protection. We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no one suggests that equal protection of the laws requires that

---

[4] "Four score and seven years ago, our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that *all men are created equal.*"

[5] "We hold these Truths to be self-evident, that *all Men are created equal.*"

all laws apply to all persons without regard to actual differences. *See Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike. . . .").

Thus, although it is established that the Fourteenth Amendment "does not deny to States the power to treat different classes of persons in different ways," *Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971), when a state regulation employs classifications, the defining criteria must have a "fair and substantial relation" to the objective of the regulation. *Id.* at 76, 92 S.Ct. at 254. An equal protection analysis, therefore, must determine initially whether the class of persons to which a state regulation applies is defined in a manner that fairly and substantially relates the class to the purpose of the regulation. But the appropriate inquiry cannot end there. To protect against unlawful discrimination the analysis must also address whether the regulation, itself, serves an adequate governmental purpose.

Because almost every action taken by the state can be characterized as involving some form of classification, ranging from the benign to the invidious, different sorts of classifications have led to different levels of scrutiny. A classification based on race or national origin or which affects fundamental rights secured by the Constitution, because it is deemed to be inherently suspect, is examined most closely and is justified only by a necessary relationship to a compelling state interest. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 432-33, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984) (racial classification). On the

other hand, other classifications, based, for example, on economic factors, need only be rationally related to a legitimate governmental interest. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). A classification based on sex requires some scrutiny more focused than that for economic classification. While classification by sex is not subjected to the same strict scrutiny as are classifications by race and national origin or which affect fundamental rights, the Supreme Court has developed an intermediate level of review for gender-based classifications. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an *important governmental objective*." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) (emphasis added); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982).

Accordingly, to conduct the appropriate Fourteenth Amendment analysis in this case, we must determine whether the state policy of excluding women from admission to VMI is substantially related to an important policy or objective of Virginia.

III

VMI argues that its own admissions policy is the state's policy because the admissions policy is by statute delegated to each state institution. The code provisions establishing VMI provide that its Board of Visitors "shall prescribe the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va.Code Ann. § 23-104. And this delegation of admissions policy-making is confirmed

by the language of a Va.Code Ann. § 23-9.6:1(2), which provides that the Council of Higher Education is not empowered to affect "the standards and criteria for admission of any public institution, whether related to academic standards, residence or other criteria, it being the intention of this section that . . . student admission policies shall remain a function of the individual institutions." VMI thus contends that its admissions policy becomes the state policy so that, as its admissions policy is justified by the mission of developing citizen soldiers, a legitimate and important state purpose is served.

To address VMI's argument, we must first decide whether VMI's male-only admissions policy, maintained pursuant to state-delegated authority, is a classification justified by a fair and substantial relationship with the institution's mission of developing citizen soldiers, and this in turn leads to an examination of whether VMI's mission would be materially altered by the admisison of women.

Much of the debate between the parties relates to the physiological differences between men and women and the question of a woman's ability to perform and endure the physical training included in VMI's program. While it is agreed by the parties that *some* women can meet the physical standards now imposed on men, it is also agreed that a smaller percentage of women can do so. Based on evidence about the experience of the service academies and the Marine Corps, the district court was justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order to subject women to a program equal in effect to that of men, and that, as found by a study conducted at West Point, cadets of both sexes would

nevertheless perceive the treatment of them as unequal, leading to jealousy and resentment.

All the parties also agree that men and women would and should be entitled to some degree of privacy, at least to the extent that men and women not, in all respects, be exposed to each other. While again there was much debate among the parties as to the changes that might be required to accommodate this at VMI with the admission of women, all agreed that some accommodation would be necessary.

Finally, the parties have debated extensively the effect of cross-sexual confrontations that the adversative program would produce. Testimony was received that the deliberate harassment that upperclassmen give to "rats" would play out differently when the upperclassman is of one sex and the "rat" another. While the government attributed the predicted effect of this as stereotyping, the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology. The court relied on testimony by experts and similar such observations made in the West Point study.

The sum of the changes that could be expected prompted the district court to conclude that if VMI became coeducational, it would offer "neither males nor females the VMI education that now exists." The court observed that "equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism," which is a critical characteristic that now pervades several aspects of VMI's methodology. And the record supports the district court's findings that at least these three aspects of VMI's program—physical training, the absence of

privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training.

The district court's conclusions that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology are adequately supported. And the district court was not clearly erroneous in concluding that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 [6] is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

The argument by the government that VMI's existing program is maintained as the result of impermissible stereotyping and overly broad generalizations, without a more detailed analysis, might lead, if accepted, to a finding that would impose a conformity

---

[6] From the paradoxical rule found in the novel, *Catch-22*, by Joseph Heller (1961).

that common experience rejects. Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated. Indeed the evidence in this case amply demonstrated that single-genderedness in education can be pedagogically justifiable.

For instance, in a ten-year empirical study reported by Alexander W. Astin in *Four Critical Years: Effects of College on Beliefs, Attitudes, and Knowledge* (San Francisco: Jossey-Bass 1977), it was found that single-sex colleges have advantages over coeducational colleges in numerous areas. A summary of the report provided by the parties in this case states:

> Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.

J.A. 1830. In addition to providing substantial benefits to college students, single-sex education also has been found to have salutary consequences for sexual equality in the job market. In a study conducted by Marvin Bressler and Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650, 662 (1980), the authors observed that in single-sex colleges, the students were more likely to set aside initial, stereotypical job aspirations in favor of more sex-neutral aspirations. They concluded from their data,

> The available evidence thus fails to support the hypothesis that coeducation is a useful instrument for altering the imbalance in career aspirations of academically superior men and women undergraduates.
>
> * * * *
>
> [I]f all selective residential colleges reverted to single sex status, a notable fraction of all men and an even larger proportion of all women would probably renounce initial career commitments, a development which would have salutary consequences for sexual equality in the job market.

The experts for both sides in this case appear to agree with the conclusions reached in these studies.

Thus, while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men *and* women appear to have benefited from single-sex education in a materially similar manner. The evidence about the VMI system suggests no differently. The problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally arise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI.[7]

---

[7] We do not intend to imply that separate, single-sex institutions or programs are "equal" to coeducational ones for equal protection purposes. But, to the contrary, the data suggest that *differences* between a single-gender student population and a coeducational one justify a state's offering single-gender education.

In summary, the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so. It is not remarkable therefore that the government in its brief conceded, "[I]t is not our position that the Fourteenth Amendment embodies a per se bar to public single-sex education."

IV

While this conclusion answers the question of whether VMI's male-only policy is justified by its institutional mission, the argument does not answer the larger question of whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification and which was relied on by the district court.

The parties agree that VMI offers a unique combination of education and training that makes a positive contribution offered by no other institution.[8] And the district court found, apparently without exception from any party, that "VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." The decisive question in this case therefore

---

[8] At one point VMI suggested that a similar educational opportunity was provided to women by the program at Virginia Polytechnical Institute and State University. It has not pressed that point and in its brief confirms that VMI's program is "unique and remarkably successful." Similarly the government characterized VMI's program as "distinctive" and "not available anywhere else in Virginia."

transforms to one of why the Commonwealth of Virginia offers the opportunity only to men. While VMI's institutional mission justifies a single-sex program, the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women. Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex female institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderedness.

Virginia has committed the development of its educational policy in the first instance to the State Council of Higher Education for Virginia, but affords each institution of higher learning significant autonomy. *See* Va.Code Ann. § 23-9.6:1. Moreover, a specific statute reserves control over VMI in the General Assembly. *See* Va.Code Ann. § 23-92. To oversee and coordinate the several state-supported institutions of higher education, however, the Council of Higher Education is charged with the responsibility of preparing plans, which it has done biennially. These plans articulate "access, excellence and accountability" as an overriding goal of Virginia's system of higher education, and they reaffirm a policy of *autonomy and diversity* to provide a variety of choice. The Council's plans also urged a continuing effort of coordination among the state's public and private institutions to avoid duplication and expense.

Announcing a similar policy, a special commission legislatively established to chart the future goals of higher education in Virginia, the Commission on the University of the 21st Century, reported to the Governor and the General Assembly of Virginia in 1990 that the hallmarks of Virginia higher education, "autonomy and diversity," should be maintained. Within its report, the Commission indirectly reaffirmed the earlier stated policy of affording broad access to higher education in Virginia, and also observed:

> Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely important that they deal with faculty, staff, and students *without regard to sex, race, or ethnic origin.*

(Emphasis added.) That statement is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions. Our inability to find a stated policy justifying single-sex education in state-supported colleges and universities is confirmed by the Virginia Attorney General's statement about the absence of such a state policy: "In the *absence* of a statute explicity expressing the General Assembly's view on the policy issue, [the Governor's] statement of the Commonwealth's policy [that 'no person should be denied admittance to a State supported school because of his or her gender'] is persuasive." (Emphasis added.)

The lack of a state-announced policy to justify gender classifications is aggravated by the reluctance of the Commonwealth, as a party, and its governor to participate in this case and in this appeal. To the extent that the Governor's view represents state policy, VMI's single-sex admissions policy violates state policy.

If VMI's male-only admissions policy is in furtherance of a state policy of "diversity," the explanation

of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender. Moreover, if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions.

On a more empirical level, we have been given no explanation for the movement away from gender diversity in Virginia by public colleges and universities. At one time most of Virginia's institutions of higher learning were single-sex, including four all-female institutions. Today, all but VMI are coeducational. If VMI thus remains male in furtherance of the state's policy of diversity, which includes diversity in gender, did the decisions of the other institutions violate state policy by moving uniformly to coeducation? At most, VMI could argue that the policy of institutional autonomy in establishing admissions requirements produces a diversity by virtue of the individual random decisions of its 15 institutions. But that randomness has fortuitously resulted in 14 coeducational institutions and VMI, an all-male institution.

In short, VMI has adequately defended a single-gender education and training program to produce "citizen soldiers," but it has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity.

V

We are thus left with three conclusions: (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women.

Although neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women, the Commonwealth has elected, through delegation or inaction, to maintain a system of education which offers the program only to men. In the proceedings below, Virginia had the opportunity to meet its burden of demonstrating that it had made an important and meaningful distinction in perpetuating this condition. *See Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981). As the record stands, however, evidence of a legitimate and substantial state purpose is lacking.

In light of our conclusions and the generally recognized benefit that VMI provides, we do not order that women be admitted to VMI if alternatives are available. But VMI's continued status as a state institution is conditioned on the Commonwealth's satisfactorily addressing the findings we affirm and bringing the circumstances into conformity with the Equal Protection Clause of the Fourteenth Amendment. By

commenting on the potential benefits of single-gender education while discussing the alleged governmental interest in support of VMI's admissions policies, we do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter. Rather, we remand the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

Accordingly, we vacate the judgment and remand the case to the district court: (1) to require the defendants to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment, (2) to establish appropriate timetables, and (3) to oversee the implementation of the plan.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

On Petition for Rehearing with Suggestion for Rehearing In Banc

Nov. 19, 1992

Appellees filed a petition for rehearing with suggestion for rehearing in banc and appellant filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener and Hamilton voted to rehear the case in banc, and Chief Judge Ervin and Judges Russell, Hall, Phillips, Murnaghan, Wilkins, Niemeyer, and Williams voted to deny a rehearing in banc. Judges Wilkinson and Luttig did not participate in the decision.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Phillips and Judge Ward, Senior United States District Judge sitting by designation.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civ. A. No. 90-0126-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

COMMONWEALTH OF VIRGINIA, ET AL., DEFENDANTS

June 14, 1991

MEMORANDUM OPINION [1]

KISER, District Judge.

The Controversy

It was in May of 1864 that the United States and the Virginia Military Institute (VMI) first confronted each other. That was a life-and-death engagement that occurred on the battlefield at New Market, Virginia. The combatants have again confronted each other, but this time the venue is in this court. Nonetheless, VMI claims the struggle is nothing short of a life-and-death confrontation—albeit figurative.

---

[1] Detailed findings of fact are set forth in the Appendix to this Memorandum Opinion, portions of which will be referred to throughout the Opinion.

The conflict between the parties arises out of the United States' challenge to VMI's all-male admissions policy. The United States asserts that as a state-supported college, VMI's refusal to admit females to the Institute, regardles of their qualifications, violates the Equal Protection Clause of the Fourteenth Amendment. VMI counters by saying that although it discriminates against women, the discrimination is not invidious but rather to promote a legitimate state interest—diversity in education. Thus, the issue to be resolved is whether VMI's practice of excluding women can pass muster under the equal protection clause, as glossed by the decisions of the Supreme Court. I find that it can, for the reasons that I hereafter state.

Jurisdiction

This Court's jurisdiction was properly invoked under Title IV of the Civil Rights Act, 42 U.S.C. § 2000c-6, which permits the United States to bring actions alleging discrimination in violation of either the United States Constitution or other federal statutes.

Because single-sex colleges and single-sex military schools are exmpted from Title IX of the Civil Rights Act, 20 U.S.C. 1681(a)(4) and (5), the United States alleged only a constitutional violation and no statutory violation. The Department of Justice's authority to bring a suit under Title IV is not limited by Title IX. *United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 147-51 (1st Cir.1985). Of course, although Congress could deprive the Attorney General of the authority to bring this action, it could not pass a statute that would exempt VMI's alleged equal protection violations from judicial re-

view. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 733, 102 S.Ct. 3331, 3340, 73 L.Ed.2d 1090 (1982).

Procedural Background

This case originated from a complaint filed by the United States Department of Justice on behalf of a female high school student who wanted to be considered for admission to VMI. The named defendants were the Commonwealth of Virginia; Governor Lawrence Douglas Wilder; Virginia Military Institute, its president, superintendent, and members of its Board of Visitors; and Virginia's State Council of Higher Education and its members. The State Council of Higher Education and its members have been dismissed from the suit. The Commonwealth has been granted a stay relieving it of the duty to appear at trial, under the condition that it be bound by any ruling of this Court. Governor Wilder was relieved of the duty to respond to any subpoenas requiring him to testify at trial. In response to an earlier motion, he stated that he did not oppose entry of summary judgment against himself and the other defendants. The VMI Foundation and the VMI Alumni Association, private organizations associated with VMI, have intervened as defendants in the case over the United States' objection. *See* ruling of November 27, 1990.

A six-day trial was held beginning April 4, 1991. Nineteen witnesses testified, including four experts on education, one expert on college facilities, and one expert on human physiology. All defendants, except Governor Wilder, were represented by common counsel. Governor Wilder was represented by counsel, but

he did not personally appear or participate in the trial.

Standard of Review

The VMI Board of Visitors decides the admissions policy of VMI. The seventeen members of this Board are appointed by the Governor of Virginia, subject to approval by the General Assembly, including the State Adjutant General, who is a member *ex officio*. Va.Code § 23-93; Va.Code § 44-11 (Adjutant General also nominated by Governor subject to General Assembly approval). Twelve of the members must be VMI alumni.

All parties recognize that this case concerns educational policy, and the proper standard of review should be derived from cases concerning higher education. The principle of academic freedom, an aspect of the freedom of association guaranteed by the First Amendment, has been recognized by the Supreme Court as a reason to defer to academic decisionmaking by a university. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978).[2] The essential freedoms of a university include the freedom to choose who may be admitted to study. *Id.* (Quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (Justice Frankfurter concurring)). "[A]ttainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." *Id.*

[2] However, this is not the same degree of deference as is accorded Congress in matters of national defense. *See Rostker v. Goldberg*, 453 U.S. 57, 64-67, 101 S.Ct. 2646, 2651-53, 69 L.Ed.2d 478 (1981).

While *Bakke* involved diversity within a single graduate program,[3] other courts have extended the rationale of that decision to include the freedom to create different missions at different state universities, in order to promote diverse educational opportunities within the state. *Williams v. McNair*, 316 F.Supp. 134, 137 (D.S.C.1970) (three-judge panel), *aff'd*, 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed. 235 (1971) (per curiam); *Ayers v. Allain*, 914 F.2d 676, 687 (5th Cir.1990 *en banc*), *cert. granted sub nom. United States v. Mabus*, —— U.S. ——, 111 S.Ct. 1579, 113 L.Ed.2d 644 (1991).

However, deference to university decisions is not absolute. The Supreme Court ordered racial integration of graduate programs long before it ordered desegregation of lower public schools. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). Courts have, in some cases, entered injunctions that have the effect of overruling discretionary educational decisions of individual colleges, where those decisions tend to perpetuate unconstitutional discrimination. In *Norris v. State Council of Higher Education*, 327 F.Supp. 1368 (4th Cir.), *aff'd*, 404

[3] In *Bakke*, the University of California attained racial diversity by reserving a number of openings in its medical school for minorities. Because of that quota system, Bakke was denied admission. It seems to me that a policy does not differ in principle, but only in degree of restrictiveness, from a policy which totally restricts admission of an identifiable class.

U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971), a three-judge panel of the Fourth Circuit entered an injunction preventing Richard Bland College, a two-year branch of the College of William and Mary, from expanding into a four-year college, because that would have impeded desegregation of nearby Virginia State College.

Sex Discrimination

The first court challenge to sex segregation in Virginia higher education appeared in *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D.Va.1970) (three-judge panel) (approving consent order). In that case, the court found that "we think it fair to say from the evidence that the most prestigious institution of higher education in Virginia is the University of Virginia in Charlottesville." *Id.* at 186. The court was reluctant to "interfere with the internal operation of any Virginia college or university," but it encouraged a settlement that required the university to admit women. But the court refused to enter an order requiring Virginia to admit both sexes to all of its universities:

> We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?

Id. at 187.

Another early Fourth Circuit decision, affirmed by the Supreme Court, involved Winthrop College in Rock Hill, South Carolina. *Williams v. McNair, supra.* In that case, male students wanted to attend an all-female college. The Court noted that South Carolina had one public all-male college (The Citadel, which like VMI offers a military program), and several co-educational institutions. The court noted,

> It is conceded that recognized pedagogical opinion is divided on the wisdom of maintaining "single-sex" institutions of higher education but it is stipulated that there is a respectable body of educators who believe that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex."

316 F.Supp. at 137. Unlike *Kirstein*, there was no feature of Winthrop College other than its single-sex status that made it distinctive, and the plaintiffs' interest in attending college in the town where they lived was found to be less than compelling. The denial of admission to them was not an equal protection violation.[4]

Hogan, supra, guides my decision in this case. In *Hogan*, the Supreme Court conducted a factual inquiry into the justification for the policy of the Mississippi University for Women of allowing men to audit courses in the nursing program, but not granting them

[4] This reasoning was adopted by Justice Powell in dissent in *Hogan*, 458 U.S. at 736, 102 S.Ct. at 3342 ("There is, of course, no constitutional right to attend a state-supported university in one's home town").

academic credit. It concluded that the policy denied equal protection to the plaintiff, who wished to earn credit for advanced nursing courses at the school.

The *Hogan* court applied the "intermediate scrutiny" test:

> [T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden is met only by showing at least that the discrimination serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Hogan, 458 U.S. at 730, 102 S.Ct. at 3339 (citations and punctuation omitted).[5]

Where a state offers an educational opportunity to only one gender,

> The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 731 n. 17, 102 S.Ct. at 3340 n. 17. Finally,

[5] This is the "intermediate judicial scrutiny" test, now universally employed in sex discrimination cases based on the equal protection clause. The test originated in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and so had not been applied in *Kirstein* or *Williams*. G. Gunther, *Constitutional Law* 647 n. 3 (11th ed. 1985).

> [a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 724-25, 102 S.Ct. at 3336.

Hogan involved admission of a single student into the nursing school, and the Court did not purport to extend its ruling to cover other programs at the school. *Id.* 458 U.S. at 733, 102 S.Ct. at 3340 (Chief Justice Burger dissenting). These determinations require a fact-intensive examination of the practical considerations underlying the challenged policy.

Many of the facts underlying the Supreme Court's rejection of the justification proferred in *Hogan* are not present here. In *Hogan*, Justice O'Connor's majority opinion emphasized that the

> uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, . . . that the presence of men in the classroom would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools do not dominate the classroom. . . . In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Hogan, 458 U.S. at 731, 102 S.Ct. at 3339.[6] The record in this case is directly to the contrary. The record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females. Moreover, the evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.

One of the most striking differences in the two cases is the reasons proffered to justify the discrimination. In *Hogan*, Mississippi maintained that a female-only admission policy at MUW was affirmative action which was justified to compensate women for past discrimination whereas, here, Virginia urges that a male-only admission policy at VMI promotes diversity within its statewide system of higher education. The Court found that Mississippi's proffered explanation failed both prongs of the intermediate scrutiny test, i.e., that it was not an important governmental objective and that the means of advancing the objective were not substantially related to the achievement of that objective. In contrast, diversity in education has been recognized both judicially and by education experts as being a legitimate objective. The sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution.

---

[6] The procedural posture of *Hogan* at the Supreme Court may explain why the evidence was uncontroverted. Mississippi University for Women won at the district court level on summary judgment.

I also note that the plaintiff in *Hogan* was a resident of the town where Mississippi University for Women was located. He would have had no opportunity to study his chosen profession (nursing) within commuting distance of his home if he could not attend that school, and moving to a different community would have presented him with a significant hardship. *Id.* 458 U.S. at 735 n. 1, 102 S.Ct. at 3342 n. 1 (Justice Powell dissenting). VMI does not offer an advantage of close-to-home education to any students, male or female, because it requires all cadets to live on campus for all four years of college. Finding III.F.1. The night and Summer courses, which do serve commuting students, are open to both men and women. Findings I & III. Nor does its policy deny the opportunity to study any particular academic program to anyone, because all of the same courses, including military instruction, are available at VPI. Finding III.H.2.

Single-sex Education is a Constitutionally Legitimate Form of Diversity

A substantial body of "exceedingly persuasive" evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college. Finding VII.B. For those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement. Finding VII.B.10. Astin, *Four Critical Years* (1977). Most importantly, Dr. Conrad, the United States' expert witness on higher education, called himself a "believer in single-sex education." Finding VII.B.7. He believed that single-sex education should be provided only by the private sector, because he also believes that

public institutions should be open to all citizens to the extent possible. He concedes that his public/private dichotomy is a personal, philosophical preference rather than one born of educational-benefit considerations. An opinion based on equity rather than appropriate educational methods is entitled to little weight. Finding VII.B.7.[7] *Rostker*, 453 U.S. at 79-81, 101 S.Ct. at 2659-60.

One empirical study in evidence, not questioned by an expert, demonstrates that single-sex colleges provide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees. Alexander Astin, *Four Critical Years*, (1977); VMI Ex. 731; Finding VII.B.10. This research was cited favorably by Justice Powell in his dissenting opinion in *Hogan*, 458 U.S. at 738-39, 102 S.Ct. at 3343-44.

---

[7] VMI, like all of the colleges in Virginia, also has academic requirements for admission, including high school graduation, class rank, and Scholastic Aptitude Test performance, that effectively exclude many male candidates from the college. This kind of limitation on access apparently did not trouble Dr. Conrad.

Viewed in the light of this very substantial authority favoring single-sex education, the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's method of teaching and training.

Openness and equal treatment by public institutions is a valid legislative goal, but legislators or other decisionmakers may also take other goals into account, even when adopting a policy that discriminates on the basis of sex. *Id.* The VMI Board has decided that providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all.

Effect of Coeducation at VMI

When one considers VMI's methods of education and the effect that admission of women into the institution will have, the Board's decision to remain an all-male institution is further reinforced. Expert testimony established that, even though some women are capable of all of the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present. This is true for a variety of reasons discussed more fully in the Findings of Fact. *See* Findings VIII.D-J. In addition to converting VMI from a single-gender institution to a coeducational institution, changes in methods of instruction and living conditions would occur.

As West Point's experience in converting to coeducation bears out, the presence of women would tend to distract male students from their studies. It would also increase pressures relating to dating, which would tend to impair the *esprit de corps* and

the egalitarian atmosphere which are critical elements of the VMI experience. Finding VIII.H.

Allowance for personal privacy would have to be made. Doors would have to be locked, and the windows on all of the doors would have to be covered. This would alter the adversative environment that VMI students must now endure. Finding VIII.D.

Physical education requirements would have to be altered, at least for the women. The current program, where every student must pass precisely the same physical test before graduation, would prevent a disproportionate number of women from graduating, thus forcing VMI either to establish different requirements for women, or to eliminate or substantially reduce the requirements so that they could be applied to both sexes, which would remove one important part of the VMI system of education. Finding VIII.E-G.

The introduction of women into VMI would add a new set of stresses on the cadets, of a very different kind than the cadets now face. The belief that this would affect the educational program is well-founded in empirical evidence, and not based on an archaic stereotype. Finding VIII.1; *Williams, supra; Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 882 (3d Cir.1976), *aff'd by an equally divided court*, 430 U.S. 703, 97 S.Ct. 1671, 51 L.Ed.2d 750 (1977); *see also* Justice Powell's dissenting opinion in *Hogan*, 458 U.S. at 735-46, 102 S.Ct. at 3341-47.

Dr. Riesman testified that the adversative model of education is simply inappropriate for the vast majority of women. He felt that if VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt

a system that provides more nurturing and support for the students. Evidence supports this theory, including the West Point experience.[8] Dr. Conrad argued that some women will thrive in the adversative environment, and drastic changes in that aspect of the education will not be necessary. But as Dr. Richardson pointed out, educational systems are not designed for the exception but for the mean. Finding VII.B.1. The changes, which all parties agreed would occur, provide sufficient constitutional justification for continuing the single-sex policy.

The United States has asserted that VMI's decision to continue its single-sex policy in 1986, based on the report of its advisory committee, was not based on "reasoned analysis" or on the evidence before it. It is clear that the Committee met with some advocates of coeducation, and that it rejected their recommendations. However, the committee members also had considerable experience in higher education, as well as intimate knowledge of the VMI program.[9]

---

[8] The United States urges that the success at West Point in assimilating women into the institution is proof that VMI could do likewise. Without a doubt, VMI could do likewise, but it is equally without a doubt that VMI's present methods of training and education would have to be changed as West Point's were.

[9] Although *Hogan* requires that a state policy of sex discrimination be based on a "reasoned analysis," it does not suggest how a court should review the analysis. 458 U.S. at 726, 102 S.Ct. at 3337. I understand *Hogan* to require me to consider the constitutionality of VMI's policy *de novo*, according only such weight to the state's analysis as appears appropriate. However, I am not to substitute my judgment for that of the Board of Visitors as if I were the *primary* decisionmaker. *Rostker*, 453 U.S. at 70, 101 S.Ct. at 2654. My conclusions are based on evidence submitted at trial, and are not limited to the 1986 Mission Study Report.

The more thorough self-study undertaken by VMI as part of its accreditation by the Southern Association of Colleges and Schools demonstrates that VMI has applied reasoned analysis to all of its policies, including admissions. The Board of Visitors had available to it a substantial amount of "reasoned analysis" when it considered admissions policy.

I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission. The single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women. VMI has, therefore, met its burden under *Hogan* of showing a substantial relationship between the single-sex admission policy and achievement of the Commonwealth's objective of educational diversity.

Of What are Women Deprived

Trial testimony established that VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI. The military and academic courses are available to women at VPI, but without the intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants, and so important to its graduates. Finding V.17.

It has been established that if VMI were to admit women, it would become more similar to the military barracks at VPI, so its uniqueness would be lost. Even if this were to occur, VMI would remain

the only small college campus in Virginia offering a military program. A woman who wished to live in a military barracks, but preferred a campus of 1,300 students over one of 18,000, would benefit from the availability of VMI.

Considerable speculation, but very little evidence, was presented on the question of whether there would be any demand for a VMI education among women. Because VMI and VMI alumni direct their recruitment efforts only at men, it cannot be precisely determined how much demand there might be among women. Based on the experience at West Point, as well as VMI's experience recruiting black applicants, I conclude that some women, at least, would want to attend the school if they had the opportunity. *Hogan* seems to teach that the court must consider the constitutionality of the policy without regard to the size of the available applicant pool. The Department of Justice filed this suit on behalf of a potential applicant, and that is all that is required to test the constitutionality of VMI's admissions policy.

Absence of Comparable Opportunity for Women

Ironically, although much of the testimony at trial concerned the ways that men and women are different, my ruling is based on a trait that men and women share: Both men and women can benefit from a single-sex education. Indeed, it appears that demand for single-sex education is greater among women, and that the beneficial effects of single-sex education are stronger among women than among men. Finding II.B.3-4.

Gender discrimination, as a rule, works to the benefit of one group and to the detriment of another.

But in a real sense of the word, that is not true in this case because, as the testimony of experts demonstrates, it would be impossible for a female to participate in the "VMI experience." Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available. Consequently, it seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution.[10] But this issue is not before the Court.

The relief that the United States seeks in this suit is to require VMI to open its doors to women—not to force Virginia to establish an all-female, state-supported college. *Cf. Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (federal court could not exercise jurisdiction over school districts that had not practiced unconstitutional racial segregation in order to achieve racial balance in another school district). This aspect of the case is very similar to *Hogan* in that Hogan did not mount a constitutional challenge because there was no corresponding all-male counterpart to the MUW Nursing School but only sought admission to the MUW pro-

[10] This situation is *not* the result of a longstanding discriminatory policy, but a recent development. In 1839, the same legislative session that founded VMI also incorporated the Farmville Female Seminary Association. The Farmville Female Seminary was made a public institution in 1884. Finding II.2. In addition, Mary Washington, Radford and Madison Colleges were state-supported, all-female colleges until the late 1960's.

gram. The Court was careful to tailor its decision to the relief sought. Thus, whether Virginia can continue to rely upon private colleges to supply single-gender education to females or whether it must operate a state-supported, all-female college is not an issue to be resolved in this lawsuit.

Conclusion

In 1970, a three-judge panel of the Fourth Circuit observed that:

> The trend in this country is away from the operation of separate institutions for the sexes, but there is still a substantial number of private and public institutions, which limit their enrollment to one sex and do so because they feel it offers better educational advantages. While history and tradition alone may not support a discrimination, the Constitution does not require that a classification "keep abreast of the latest" in educational opinion, especially when there remains a respectable opinion to the contrary[.]

Williams, 316 F.Supp. at 137.

Through its Board of Visitors at VMI, Virginia has set an objective of providing single-gender education for males. The evidence in the case, which is virtually uncontradicted, supports Virginia's view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting. This adds a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational. The diversity is further enhanced by VMI's unique method of instruction which was

applauded by all of the educational experts who testified. Thus, Virginia has sustained the requirement that gender discrimination serves an important state educational objective.

Virginia also met the second prong of the *Hogan* test by proving that the objective of diversity of education is met by providing single-gender education. Obviously, the only means of attaining this goal is to exclude women from the all-male institution—VMI. But Virginia did not stop there. It enlarged on the single-gender diversity by maintaining an institution whose method of instruction is unique in all the world.

VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.

APPENDIX: FINDINGS OF FACT

I. Witnesses
A. Expert Witnesses
B. Fact Witnesses
II. Public Higher Education in Virginia
A. VMI's Contribution to System-Wide Diversity
B. Role of Private Colleges
C. Public Influence on Private Colleges
III. The Unique VMI Educational Method
A. The Adversative Model
B. Rat line
C. Class System
D. Dyke System
E. Honor Code
F. Barracks
G. Military System
H. Educational System
I. Evening and Summer Sessions
IV. VMI's Mission
A. Character Development
B. Civilian Leadership
C. Military Leadership
D. VMI Mission Study
V. Mission of Military Unit at VPI

VI. Contrasting Mission of Federal Service Academies
VII. Differences between Men and Women
A. Gender-Based Physiological Differences
B. Gender-Based Developmental Differences
VIII. Anticipated Effects of Coeducation on VMI
A. Demand for VMI Education Among Women
B. VMI's Special Recruitment of Blacks
C. Recruitment of Women at Other Military Institutions
D. Need for Privacy
E. Physical Education
F. Armed Forces Experience
G. West Point Experience
H. Impact of Gender Classes
I. Impact of Cross-Sex Relationships
J. West Point Experience
K. Educational and Military Systems
L. ROTC Programs
M. Physical Facilities

I. *Witnesses*

Testimony of the following witnesses, together with stipulations and exhibits supplied the evidence from which these Findings of Fact are made:

A. *Expert Witnesses*

1. Dr. Clifton Conrad testified as the United States' expert witness on education. He is currently Professor of Higher Education and Coordinator of the doctoral program in Higher Education at the University of Wisconsin-Madison, and previously had been on the faculties of the University of Denver, the College of William and Mary, and the University of Arizona. He holds a Bachelor's Degree from the University of Kansas and a Ph.D. in higher education from the University of Michigan. His scholarship has focused on academic programs in higher education. His books and monographs include *The Undergraduate Curriculum* (1978), *Liberal Education in Transition* (1980, with Jean Wyer), and *Curriculum in Transition: Perspectives on the Undergraduate Experience* (1990, with Jennifer Haworth). In 1987-88, he served as president of the Association for the Study of Higher Education. He has testified in several other desegregation cases involving higher education on behalf of the United States. U.S. Ex. 160.

2. Mr. James Francis Brewer, III, testified as the United States' expert witness on physical facilities. He has been Director of Physical Plant at the University of Maryland at College Park since 1985. He holds B.S. and M.B.A. degrees from the University of Maryland. U.S. Ex. 161.

3. Dr. Richard C. Richardson, Jr. testified as one of VMI's experts on educational institutions. He is Professor of Educational Leadership and Policy Studies at Arizona State University. He holds a B.S. degree in education from Castleton State College, as M.A. from Michigan State University, and a Ph.D.

from the University of Texas. After earning his Bachelor's Degree, he served in the Marine Corps for three years, from 1954 to 1957. He taught at a single-sex (women's) college, Vermont College, from 1958 to 1961, and has both professorial and administrative experience at several colleges and community colleges. His publications include *Achieving Quality and Diversity: Universities in a Multicultural Society* (with E.F. Skinner, 1991), and *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities* (with L.W. Bender, 1987). He has previously testified on behalf of the United States in discrimination lawsuits involving higher education. He has served as chair of at least 25 different evaluation teams on behalf of regional higher education accreditation boards, including one team that evaluated West Point. His research in the past 10 years has focused on "the impact of students on colleges and the impact of colleges on students." Tr. 661-66.

4. Dr. David Riesman, a professor of sociology at Harvard University, testified as a VMI expert on education. He holds a bachelor's degree from Harvard College earned in 1931, and a law degree from Harvard Law School earned in 1934. After completing a year of postgraduate study, he served as a law clerk to Justice Brandeis at the United States Supreme Court. He held a teaching post at Buffalo School, and then spent a year as a research fellow at Columbia Law School studying sociology and anthropology. He joined the faculty at the University of Chicago in 1946, and returned to Harvard on the faculty in 1958. His publications include *The Lonely Crowd* (1950), *Constraint and Variety in American Education* (1956), *The Academic Revolution* (with

Christopher Jencks 1968), and *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (with several collaborators 1980). Because he was unable to travel, he appeared only on videotape produced at a *de bene esse* deposition.

5. Josiah Bunting, III, testified as another VMI expert on educational institutions. Since 1987, he has served as Head Master of The Lawrenceville School, a private preparatory school in New Jersey that changed from all-male to coeducational during his tenure. He graduated from VMI in 1963, and won a Rhodes Scholarship and earned an M.A. at Oxford. He served in the United States Army from 1966 to 1972, serving in the infantry, and as Assistant Professor at West Point. From 1972 to 1973 he was Professor and Acting Head of the U.S. Naval War College. From 1973 to 1977, he served as President of Briarcliff College, then an all-female college. From 1977 to 1987, he was president of Hampden-Sydney College, an all-male private college.

6. Dr. Paul Davis testified as VMI's expert on human physiology. He holds a bachelor's degree from Columbia Union College, and earned a master's degree in physical education from the University of Maryland, and a Ph.D. from the University of Maryland College of Health and Human Performance, Department of Kinesiology, with a major in exercise physiology and a minor in research design and statistics. He has taught physical education to both sexes at the elementary school, junior high school and high school levels, and taught applied physiology at the University of Maryland. He has done extensive consulting for the United States Armed Forces on the

development of physical training programs for both men and women. Tr. 879-84.

B. *Fact Witnesses*

1. General John William Knapp is the Superintendent of VMI. He graduated from VMI in 1954, holds a Ph.D. from Johns Hopkins University, and has been a professor or administrator at VMI since 1959. He was Dean of Faculty from 1984 to 1989, when he was promoted to superintendent. Tr. 28-30.

2. Colonel Norman M. Bissell is the Commandant of Cadets at VMI, a position comparable to Dean of Students at another college. He graduated from VMI in 1961, and received a master's degree from the University of Missouri in 1984. He was on active duty in the United States Army from 1961 to 1987, and returned to VMI in 1990. Tr. 95-96.

3. Lieutenant Colonel Mark Steven Sandy is the director of admissions at VMI. He holds a B.S. from Concord College, and has a master's degree in education administration from Lynchburg College. He assumed his current post in 1988.

4. Colonel Ronald Walker Williams is Professor of Aerospace Studies at VMI. He graduated from VMI in 1964 and earned a master's degree from Golden Gate University in 1985. He has been on active duty with the Air Force for the past 25 years, and has been posted at VMI by the Air Force for a three-year assignment in 1988. He teaches the Air Force ROTC courses at VMI. Tr. 213-14.

5. Colonel William A. Randall is a professor of military science at the University of Virginia, where he is completing a three-year assignment. He holds a B.A. degree from Auburn University and a master's

degree from Duke University. He has been on active duty in the military since 1966. Tr. 243-44.

6. Colonel Rutherford Dean Stickell is Professor of Aerospace Studies and Chairman of the Air Force ROTC program at the University of Virgina. He holds a bachelor's degree from The Citadel, and a master's degree from the University of Southern California, and has been in the military for over 20 years.

7. Joseph M. Spivey, III, is Chairman of the Board of Visitors of VMI. He holds a bachelor's degree from VMI and a law degree from Washington & Lee University. He was admitted to the Virginia bar in 1962, and is a practicing attorney. He was appointed to the VMI Board of Visitors in 1983 and has been chairman since 1987. Tr. 275-76.

8. Dr. Clark King is the head of the Physical Education Department at VMI, and director of the continuing education programs, including both the night and the summer programs. He holds a bachelor's degree from Kearney State College and a doctorate from the University of Virginia. He has been associated with VMI since 1952, and has been chair of physical education since 1963. Tr. 292-94.

9. Major General Stanton R. Musser is Commandant of Cadets at Virginia Polytechnic Institute State University. He holds a bachelor's degree from Gettysburg College, and a master's degree from Central Michigan University. He served in the United States Air Force from 1958 to 1989, and accepted his current position upon retirement. Tr. 441-42.

10. Colonel Patrick Toffler is Director of the Office of Institutional Research (OIR) at the United States Military Academy ("West Point"). He graduated from West Point in 1968, and holds a master's degree from the Naval postgraduate school. The function of the OIR "Is to assess the degree to which [West Point] is successful in realizing its purpose, accomplishing its mission, achieving its outcome goals, and to assist the major decisionmakers in the conduct of their duty." The Office prepares reports on aspects of the West Point programs and Colonel Toffler comes into contact with all of the West Point constituencies. Tr. 478-481.

11. Colonel John Walter Ripley is the commanding officer of the Navy and Marine ROTC programs at VMI. He joined the Marine Corps directly after high school, and then received a fleet appointment to the Naval Academy, from which he graduated in 1962. He also holds a Master's Degree from American University. He has been an active-duty marine for over thirty years, and his service includes teaching appointments at Oregon State University and the Naval Academy prior to his current duty at VMI. Tr. 814-16.[1]

II. *Public Higher Education in Virginia*

1. There are fifteen state-supported four-year colleges in the Commonwealth of Virginia:

Christopher Newport College
Clinch Valley College
College of William and Mary
George Mason University
James Madison University
Longwood College

[1] Testimony was also received from Commander Paul Galanti, a retired Navy Recruiting Officer, General James Morgan Dean of Faculty Emeritus of VMI, and Colonel Paul Maini, Executive Director of the VMI Alumni Association. This testimony did not contribute to the findings of fact.

Mary Washington College
Norfolk State University
Old Dominion University
Radford University
University of Virginia
Virginia Commonwealth University
Virginia Military Institute
Virginia Polytechnic Institute and
State University
Virginia State University

Stipulation 126.

2. Historically, most of Virginia's public colleges were single-sex. Four colleges were originally limited by statute to women only. Mary Washington College, legislatively founded in 1908, became coeducational in 1970. Radford University, founded in 1910, became coeducational in 1972. Longwood College, founded as Farmville Female Seminary Association in 1839 and converted into a public institution in 1884, began a diversification program that led to the admission of men in 1949.[2] James Madison University, founded in 1908, became coeducational in 1966. Stipulation 111; 1839 Va. Acts ch. 167; 1884 Va. Acts ch. 311.

3. On the men's side, the University of Virginia first admitted women only after its single-sex policy was attacked in court. *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F.Supp. 184 (E.D.Va.1970). Virginia Tech was also originally male only.

---

[2] The stipulation does not state when Longwood first admitted men. The court in *Kirstein v. Rector and Visitors of University of Virginia*, 309 F.Supp. 184, 186 (E.D.Va.1970), listed Longwood as admitting women only.

4. All public colleges in Virginia, except for the Virginia Military Institute, are now coeducational. Thus, Virginia has one all-male public institution and no all-female colleges.

5. In the Fall of 1989, enrollment at the 15 public institutions included 72,819 men and 85,441 women. Stipulation 113. Of that number, 1312 (all men) are enrolled at VMI. VMI is substantially smaller than all of the colleges in the system except for Clinch Valley College, which has a very different mission.

6. Virginia offers a diverse array of educational opportunities through the decisions of the respective autonomous governing boards of Virginia's colleges and universities, public and private. The State Council of Higher Education's current plan for higher education states that "Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education." Stipulation 108.

7. The Boards of Visitors of the various public colleges and universities in Virginia have traditionally enjoyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission, curriculum, the composition of its faculty, and the composition of its student body.

8. The 1990 Report of the Commission on the University of the 21st Century to the Governor and the General Assembly of Virginia notes that the hallmarks of Virginia's educational policy are "diversity and autonomy." Stipulation 105. It further states

> The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, tradi-

> tionally black and single sex. Opportunities for fundamental change are open to all. But the sea change being felt in Virginia affects the entire system, and we think that Virginia should encourage creativity and discourage complacency by its method of governing higher education and by financial and other rewards.

Stipulation 106.

9. All expert witnesses agree that Virginia's system of higher education is diverse. Tr. 403 (Conrad); Riesman Dep. 89-91; Tr. 984 (Bunting). The diversity is a consequence of the relatively great autonomy given to the individual Boards of Visitors.

10. All Virginia statutes requiring individual institutions to admit only men or women have been repealed. Whether a university should be single-sex or coeducational is in every case decided by the Board of Visitors of the institution.

A. *VMI's Contribution to System-Wide Diversity*

1. VMI contributes to the diversity of Virginia's higher education in two related ways: (1) by providing an opportunity for single-sex education, and (2) through the unique VMI method of character development and leadership training.

2. Institutions of higher education that admit only males contribute greatly to diversity in higher education, and should be preserved. Diversity between different kinds of colleges as well as diverse student bodies at individual colleges is a positive aspect of the American, and the Virginia, higher education system. Riesman Dep. 22, 38-39.

3. Diversity between colleges, and the very high number of colleges, is one of the more striking differences between the American and British higher education systems. Tr. 984 (Bunting).

4. Aside from the unique qualities of the education VMI provides, the Commonwealth of Virginia awards some scholarships, the VMI State Cadetships, exclusively to VMI cadets. During 1990-91, 35 cadets were awarded $147,104. Defendants' response to plaintiff's third set of interrogatories at 16. A substantial number of private scholarships are also available only to VMI cadets. Women have no opportunity to compete for these scholarships.

5. Dr. Conrad concluded that the diversity of Virginia's higher education would not be diminished were VMI to admit women. He acknowledged, however, that single-sex education is a form of diversity. Tr. 371-74, 381-82.

B. *Role of Private Colleges*

1. There are five all-female private colleges in Virginia, Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, Hollins College, and Southern Seminary College (which offers only a two-year program). There is one private all-male college in Virginia, Hampden-Sidney College. VMI Exhibit 74A.

2. In the fall of 1989, 3850 women and 2256 men were enrolled in single-sex institutions of higher education in Virginia. All of the women, and 944 of the men, were enrolled in private institutions. Stip. 114.

3. Nationwide, 11,400 men attend single-sex institutions. Of this number, 2,000-3,000 attend The Citadel, a public military college in Charleston, South Carolina; 1,300 attend VMI; and the remainder at-

tend one of nine private institutions. Tr. 675, 724-25 (Richardson). There are about 56 single-sex schools for women, enrolling about 64,000 students. All but one of these are private, the exception being Douglass College in New Brunswick, New Jersey, which shares the campus of the much larger Rutgers University. The Mississippi College for Women remains primarily for women, but is required to admit men to its nursing program. *Hogan;* Tr. 676, 725 (Richardson).

4. From the above statistics, it would appear that the demand for public higher education in Virginia is slightly greater among women than among men. The demand for single sex education is substantially greater among women than among men, both in Virginia and nationwide. The presence of four all-female private schools in Virginia further indicates that the private sector is providing for that form of education to a much greater extent than it provides for all-male education.

5. No defense witness in this case offered to explain why Virginia provides the option of single-sex public education to men but not to women. This appears to be the consequence of individual decisions by each public college in Virginia to admit men. No evidence was submitted concerning the cost or practicality of creating a new, all-female public college, or of converting an existing college into an all-female institution.

C. *Public Influence on Private Colleges*

1. The Virginia Constitution permits the General Assembly to provide loans and other aid to students attending nonpublic institutions of higher education.

Va.Const.Art. VIII, § 8; Stipulation 88. Virginia provides this aid through the Tuition Assistance Grant program. Va.Code § 23-38.11 *et seq.*

2. The report of the General Assembly Commission on Higher Education to the General Assembly of Virginia (Senate Document 19, 1974) states: (a) "Virginia needs the diversity inherent in a dual system of higher education." (b) "Higher education resources should be viewed as a whole—public and private." (c) "Even without state economic aid to private colleges, it is academic and economic waste to permit unwarranted duplication." VMI Ex. 4, at 16.

3. Virginia relies on its independent institutions to offer students choices and meet the educational needs of people in the Commonwealth. Tr. 710 (Richardson). There is substantial voluntary cooperation between the public and private institutions on a variety of programs. VMI Ex. 55.

4. The Boards of Visitors of all of the Virginia public colleges are nominated by the Governor and are subject to confirmation by the State Senate. *See generally* Va.Code § 23. Private colleges face no legal restrictions in how they choose their directors.

5. Aside from the choice of particular college, a significant practical difference for a Virginia resident between attending a public and a private college is that, even with the Tuition Assistance Grant, the private education will be much more expensive.

III. *The Unique VMI Educational Method*

1. The VMI method conforms generally to an adversative, or doubting, model of education. Physical rigor, mental stress, absolute equality of treat-

ment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience.

2. Some of the defendants initially argued that the VMI experience is available to women in substantially the same form at Virginia Polytechnic Institute State University (VPI). In answer to an early interrogatory, the Commonwealth stated, "There is no unique or special benefit, educational or otherwise, available at VMI which cannot also be obtained elsewhere in Virginia's higher education system." Response of Commonwealth to Second Set of Interrogatories, No. 4. Evidence at trial disproves this contention, which was never asserted by VMI itself. VMI and the military barracks at Virginia Polytechnic Institute are dramatically different institutions that offer dramatically different experiences.

3. The system of education at VMI is not offered elsewhere in the United States. Therefore, women have no opportunity anywhere to gain the benefits of this education. Tr. 139 (Bissell); 373 (Conrad).

4. VMI is sought out by some applicants for admission because it is known to be the most challenging military school in the United States, and because its alumni are exceptionally close to the school. Tr. 206 (Sandy).

A. *The Adversative Model*

1. The VMI experience is predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart. VMI Ex. 58 (Richardson Report) at 22-23.

2. The adversative model has been used by military service and in the English public schools. Tr. 686 (Richardson).

3. The adversative model is not in widespread use in American higher education. Dr. Riesman's writings have criticized the permissiveness of American society and the lack of experiencing stress. Dr. Riesman believes that young people rarely experience difficult physical or intellectual demands. Few young people undergo a truly demanding academic program, and even fewer involve themselves in demanding extramural (i.e., outside of the curriculum) programs. While most colleges and universities make it *possible* for a student to get a good education, many such institutions make it easy for students merely to get by. Riesman Dep. 25-30.

4. Colonel N. Michael Bissell, the Commandant of Cadets at VMI, summarized the educational process at VMI as follows:

> I like to think VMI literally dissects the young student that comes in there, kind of pulls him apart, and through the stress, everything that goes on in that environment, would teach him to know everything about himself. He truly knows how far he can go with his anger, he knows how much he can take under stress, he knows how much he can take when he is totally tired, he knows just exactly what he can do when he is physically exhausted, he fully understands himself and his limits and capabilities. Something I think is the mainstay of leadership. I think every VMI man that leaves there knows a great deal about his human capacity to do things under all kinds of duress and stress.

Tr. 803-04; *see also* Tr. 820-22 (Ripley).

5. All experts agreed that the individual systems comprising the VMI method for leadership and character development must be understood holistically. The individual systems are integrated into a unified experience through the barracks life. Altering any system will affect the educational experience as a whole. Tr. 690, 707, 758 (Richardson), 993 (Bunting), 780-81 (Bissell), 409 (Conrad).

B. *Rat line*

1. Entering students at VMI are called "rats" because the rat is "probably the lowest animal on earth." In general, the rats are treated miserably for the first seven months of college. Tr. 102 (Bissell).

2. Behavior that contributes to VMI objectives is rewarded; behavior that detracts is swiftly punished. Both punishment and reward are collective as well as individual. Being punished or rewarded for the sins or accomplishments of brother rats, as well as for one's own, builds a sense of class solidarity in addition to individual responsibility. The rat line is sufficiently rigorous and stressful that those who complete it feel both a sense of accomplishment and a bonding to their fellow sufferers and former tormentors. VMI Ex. 58 (Richardson Report) at 4; Tr. 347-48 (Conrad).

3. The rat line is an extreme form of the adversative model. It challenges all values and all forms of behavior in order to instill the values and behaviors for which VMI exists. Tr. 684-85 (Richardson).

4. Features of the rat line include indoctrination, egalitarian treatment, rituals (such as walking the rat line), minute regulation of individual behavior,

frequent punishments, and use of privileges to support desired behaviors. Tr. 685 (Richardson).

5. The rat line is more dramatic and more stressful than Army boot camp or Army basic training. Tr. 785-86 (Bissell). It is comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience. Tr. 818 (Ripley), 684 (Richardson).

6. At VMI almost every conceivable kind of behavior is anticipated and prescribed. There are thousands of regulations in place that govern cadet life. Tr. 395 (Conrad).

7. "Motivational activities" including stoop runs, fifteen-minute running and calisthenic events, rifle runs, training marches, and the like, are critical aspects of the rat line. Tr. 348-49 (Conrad).

8. The rat line is a very intense experience. Part of that experience is a tough physical training program that begins during the first 8-10 days that cadets spend on the VMI campus. The rigorous physical training is an important component of the rat system. Tr. 933 (Conrad).

9. Cadets who participate in NCAA sports during the regular school year are excused from the physical parts of rat training during the hours that they are practicing their sport. Tr. 112 (Bissell). Aside from that exception, all rats participate in all aspects of rat training.

10. All VMI cadets experience the rat line. The only time cadets can join the corps at VMI is in August, at the beginning of the school year. If cadets leave after joining, they are not replaced. Tr. 92-93 (Knapp).

C. *Class System*

1. The class system at VMI is a system of privileges and responsibilities aimed at developing the character and leadership of cadets. Each class has specific responsibilities. The first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for the rat line for the following year, supervising the rat breakout, and for being a dyke to a rat. The third class, to cite another example, serves as disciplinarians to the rats. The class system is a very highly-developed system for cultivating leadership. Tr. 346-48 (Conrad).

2. After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote. This occurs within the barracks setting. The class system supplies the constant supervision of cadets, tutoring, and dispensation of privileges to reward desired values and behaviors. Tr. 687 (Richardson).

3. The degree and harshness of the regulations imposed through the class system is possible only through a peer system. Professionals working in the same environment could not duplicate the level of stresses without adverse consequences. Tr. 687-88 (Richardson).

D. *Dyke System*

1. The dyke system is closely linked to the class system, and is the arrangement by which each rat is assigned a first classman as a mentor, called a "dyke." The dyke system provides some relief

from the extreme stress of the rat line. Tr. 685 (Richardson).

2. The VMI system of education creates a sense of loyalty to one's brother rats. The dyke system contributes to this sense of loyalty. The dyke system also creates a cross-class bonding and provides a model for leadership and support. Riesman Dep. 43; Tr. 141-42 (Bissell).

E. *Honor Code*

1. The VMI honor code holds that a cadet "does not lie, cheat, steal nor tolerate those who do." The sole penalty for violations of the VMI honor code is expulsion. The VMI honor code dominates all facets of institutional life. It is stringently enforced by an honor court comprised of cadets elected from the upper two classes. VMI Ex. 58 (Richardson Report) at 6.

F. *Barracks*

1. Unlike most colleges, where the library is central and the dormitories are peripheral, the most important aspects of the VMI educational experience occur in the barracks. The barracks, therefore, are crucial to the VMI experience. Tr. 683-84 (Richardson). All cadets are required to live in the barracks for all four years at VMI. Tr. 761 (Richardson); VMI Ex. 11 at 11.

2. The barracks are the situs of the inspections, the rat-dyke relationship, administration of the class system, administration of the honor system, and much of the new cadet training, or rat line.

3. The barracks are designed to reduce all cadets to the lowest common denominator, from which the

new cadet training system, class system, honor code, military system and academic system year-by-year builds the values, attitudes and behaviors expected from VMI graduates. In the process, upperclassmen exhibit unusual concern and serve as mentors for lower classmen. Producing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp. VMI Ex. 58 (Richardson Report) at 3.

4. The report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools on March 16-19, 1986, observed that "[t]he barracks, VMI's student housing, is the center of campus life and reflects many of the educational objectives of the institution. There is no professional staff living in the barracks but cadets themselves provide support for life there." VMI Ex. 35, at 49.

5. The barracks' configuration is a training aid, and the barracks is a total training environment in which the class system functions. Each class is assigned a floor in the barracks, which has four floors. There is a total lack of privacy. Everyone knows what everyone else is doing. The closest a cadet can come to privacy at VMI is a study table in the library because there is literally no place in the barracks that physically affords privacy. The open windows on the doors in the barracks are significant because they enable the officer in charge to walk around and check in each room at night and see every cadet without anything being hidden. This spartan living and humbleness is an aspect of the egalitarian ethic at VMI. Tr. 794-98 (Bissell).

6. The average occupancy rate of cadet rooms at VMI, according to VMI's 1985 Self-Study, was 3.7 cadets per room. It is uncommon, if not unique, for a college or university to have a dormitory occupancy rate exceeding three persons per room. Tr. 435-36 (Brewer).

7. The barracks are stark and unattractive. The windows and the doors ensure that cadets are never free from scrutiny. There is constant intermingling of cadets as a result of the close and intimate quarters and the number of cadets assigned to a room. Ventilation is poor. Furniture is unappealing. A principal object of these conditions is to induce stress. Tr. 683 (Richardson), 350 (Conrad).

8. There are no locks on the doors of cadet rooms in barracks, no windows in the barracks doors, no window shades or curtains. Barracks rooms open onto stoops. The stoops are open corridors at each level and provide access to the gang bathrooms. On the fourth floor a cadet cannot go to the bathroom or go to take a shower without being observed by everyone in that quadrangle on all levels. This places cadets under constant scrutiny and permits minute regulation of behavior, especially for the fourth classmen who reside on the top floor. VMI Ex. 58 (Richardson Report) at 3; Tr. 683-84 (Richardson).

9. The egalitarian treatment associated with barracks life is as important as the elements of stress and lack of privacy. In barracks, a cadet is totally removed from his social background. Tr. 992-93 (Bunting).

10. No other institution, including the service academies, places such emphasis on barracks or dormitory life. The lifestyle system at VMI is unique. Tr. 394 (Conrad).

G. *Military System*

1. The military regulations, etiquette, and drill, primarily furnish a rationale for the rigorous activities that are features of the other VMI systems, including the comprehensive regulation of behavior and the wearing of uniforms. The military regulations confine the choices and developmental tasks confronted by students to those considered essential to the achievement of VMI's mission. They are not directly connected to the ROTC program. VMI Ex. 58 (Richardson Report) at 6; Tr. 690 (Richardson).

2. Each cadet who matriculates at VMI must select one of the four ROTC programs during the first week of school. All cadets must be affiliated with one of the four ROTC programs, for all four years at VMI. Tr. 216-18 (Williams); Stip. 33.

3. Nothing about the Air Force ROTC program at VMI, as described in the VMI promotional booklet, is unique to VMI (other than the absence of women). Tr. 234 (Williams); U.S. Ex. 95.

4. The ROTC programs at VMI operate independently of the barracks system and its various components such as the rat line, the class system and the dyke system. Tr. 819-20 (Ripley).

H. *Educational System*

1. The academic program (aside from physical education) at VMI is not unique. VMI offers undergraduate courses leading to Bachelor of Arts and Bachelor of Science degrees, in liberal arts, science, and engineering disciplines. VMI Ex. 11.

2. All of the programs offered at VMI, and virtually all of the courses, are available to women at

VPI. Because VMI is a much smaller school, it offers many fewer courses. VMI Ex. 8, 11.

3. The academic standards for admission to VMI are somewhat lower than those for VPI. VMI incoming students have slightly lower median SAT scores and slightly lower median class rank. VMI Ex. 62M.

I. *Evening and Summer Sessions*

1. The VMI summer session is not conducted as a military college. Stip. 62. During the summer session the VMI Corps of Cadets does not exist or function as an organized body. In the VMI summer session, the class system, the rat system, and the dyke system are not in operation. Stips. 62-64.

2. During the summer session, summer students are not subject to military discipline and training, and are not required to wear uniforms or participate in military formations or drills. Stip. 65.

3. During the summer session, no enrolled student, whether or not a VMI cadet, is required to live in the barracks, but has the option to reside in the barracks or in housing in the surrounding area. During the academic year, all enrolled students are required to live in the barracks. Stip. 67.

4. During the summer session, females, both students and non-students, may not live or visit in the barracks. Stip. 68.

5. During the summer session, there is no physical training and no leadership training. Stip. 71.

6. All students enrolled in the summer session are required to abide by the honor code; however, the Student Honor Court, which adjudicates honor cases during the regular session, is not in operation. Stip. 72.

7. During summer session, outsiders (i.e., non-VMI people), live in barracks. For example, participants in sports camps and in the College Orientation Workshop program for black male high school students live in the barracks. Tr. 308 (King), 794 (Bissell), Stip. 69.

8. VMI summer session differs in many ways from the VMI regular session. It has a different purpose, offers different programs, is administered separately, has different admissions criteria and does not offer a VMI degree or military training. *Id.* No. 13, Tr. 792-94 (Bissell).

9. VMI maintains a very small evening college program. Cadets are not permitted to attend the evening school, nor do evening school students participate in any cadet activities. The evening school has no military component, and cadets and evening school students interact in no respect. No evening school students live in the barracks. Tr. 294 (King); 791-92 (Bissell).

IV. *VMI's Mission*

1. The mission of VMI is concisely and authoritatively captured in the final report of the Mission Study Committee of the VMI Board of Visitors (issued May 16, 1986), which states:

> It is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

> To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

VMI Ex. 40.

2. VMI's mission is to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary. Tr. 680-81 (Richardson), 41 (Knapp).

3. The concept of citizen-soldier has been associated with VMI for nearly a century and a half. VMI's mission is to train disciplined leaders for civilian and/or military life. Tr. 341 (Conrad).

4. Dr. Conrad discerned five basic goals that VMI seeks to promote in fulfilling its mission of preparing leaders: (1) education, both general and specialized; (2) military training; (3) mental and physical discipline; (4) character development; and (5) leadership training. Tr. 343-44.

5. Dr. Conrad testified:

> [VMI] is an institution with a very, very powerful ethos. What is that ethos? It's a commitment to the citizen-soldier, a commitment in which the values of how one goes about preparing a citizen-soldier have taken shape, been nourished over time and I reflected it in the development of . . . eight, at once independent and at the same time, highly interdependent systems. This is an institution that has a very powerful ethos, a compelling institutional culture in which it is in essence a kind of total cul-

> ture. . . . People who know higher education know VMI, and now I certainly, in a much deeper sense understand the powerfulness of that ethos, [which] engenders such great strength and loyalty. . . . Here was a distinctive culture, with a rich ethos, and in many ways a quite extraordinary tradition of service to the state and nation.

Tr. 354-55.

6. It is important for a college to be able to articulate its mission, for more than public relations purposes. An institution must know and be able to tell others what it stands for and why it exists. Riesman Dep. 32-34; Tr. 388 (Conrad).

7. VMI has done a very good job of conveying its goals and its values, and has been successful in accomplishing those goals; specifically, instilling physical and mental discipline, character, and a kind of moral code. Tr. 389 (Conrad).

A. *Character Development*

1. Dr. Richard C. Richardson, Jr., an expert in higher education, single gender schools and leadership, testified that VMI is extremely unusual, even unique, in that it makes the development of character its primary purpose. VMI is primarily involved in moral development and leadership preparation. Tr. 691, 695, 765.

2. Dr. David Riesman, a leading sociologist and authority on higher education, has, in his writings, expressed dismay over the increasingly egotistical, narcissistic people coming out of our institutions of higher education. Dr. Riesman believes that the personal value of self-discipline is an important concept

for colleges and universities to teach because the popular culture supports hedonism and early gratification. As a result, young people do not develop as they should. Riesman Dep. 25.

3. As a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment. Riesman Dep. 49-50.

4. VMI alumni overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals of leadership, responsibility, self-confidence, ability to get along with others, becoming a more complete person, independence, self-reliance, adaptability, and developing a strong sense of honor and integrity. VMI Ex. 62H-62I.

5. Cadets attend VMI for these reasons: (1) because of the rigor of the experience, which represents a challenge and which he believes will test him to the ultimate; (2) because he is not satisfied with his work habits or self-discipline, and wants to become a different person; and/or (3) because he knows someone who recommends it, or because his father attended VMI. Tr. 681 (Richardson).

6. Once they arrive at VMI, cadets appreciate various attributes of the Institute: (1) the openness and the fact that they hear very directly and very candidly about their shortcomings as well as the things they do well; (2) the intensity of the experience, and the extent that it challenges them to be better; (3) the relationships they develop; and (4) the absence of distinctions between cadets, and the egalitarian environment. Tr. 681-82 (Richardson).

7. VMI's emphasis on character formation has been consistent since its founding. VMI was founded on the site of an arsenal in Lexington, Virginia, by act of the Legislature in 1839. It was patterned on the United States Military Academy at West Point and the Ecole Polytechnique, an engineering school in Paris founded during the French Revolution. VMI Ex. 54, p. 7; 68; 61; 77A; 77M; Stips. 11-13.

8. Within a few years of the founding of VMI, most of the systems of character-building and leadership training that characterize VMI today were in place, with the exception of the dyke system, which the Corps evolved later as a corrective to a rat line that had become overly harsh. VMI Ex. 61 at 397-98; 68.

9. Throughout VMI's history, its military system —the use of military regulations, etiquette and drill —has served the function of teaching self-discipline. It is intrinsic to the VMI theory of education, but it is a means to an end, not an end in itself. The role of VMI is not primarily to develop career military men for the U.S. armed services. Stips. 26, 45, 131, 135, 138, 141; Tr. 342 (Conrad), 775 (Richardson); VMI Ex. 77A, 77D, 77F, 77N, 77O, 77S, 77T.

B. *Civilian Leadership*

1. VMI takes students that are average from an academic perspective, and through the character development program, graduates people who have more than average commitment and motivation as well as character. Tr. 695 (Richardson).

C. *Military Leadership*

1. Since 1842, at least 13,954 VMI alumni have served in the armed forces during wartime. Of these,

at least 10,233 were commissioned officers and 128 were flag officers. VMI Ex. 76.

2. Military training is one of the basic goais that VMI seeks to promote in fulfilling its mission of preparing leaders. Tr. 343-44 (Conrad).

3. The VMI experience promotes the development of qualities important to effective combat leadership: Self control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit. The aspects of the VMI experience that are most significant in developing these qualities are: (1) the rat line; (2) the dyke system; and (3) the class system. Tr. 820-22 (Ripley).

4. The outcome of the VMI educational system is graduates who are prepared to be citizen-soldiers. Because of the VMI experience, VMI alumni are prepared to find the military benign in comparison with much of what they experienced at VMI. They are prepared for difficulty, and are prepared to help others in difficulty. Riesman Dep. 45-46.

D. *VMI Mission Study*

1. The General Assembly of Virginia has delegated to the VMI Board of Visitors the making of VMI's admission policy pursuant to Va.Code Annot. 23-104, with reservation to the General Assembly pursuant to Va.Code § 23-92.

2. The VMI Board has seventeen members, including the Adjutant General of Virginia who serves *ex officio*. At least four members of the Board cannot be VMI alumni. Va.Code § 23-93. The members are persons of achievement and learning from varied backgrounds, occupations and professions. Tr. 944-47, 966-67 (Spivey).

3. The VMI Board of Visitors established the Mission Study Committee in October 1983. The Committee was established to coincide with a self-study then being conducted by the Institute. The Committee was also charged with examining the legality and wisdom of VMI's single-sex policy in light of *Mississippi University for Women v. Hogan*. It was charged with researching the effect of integration of women into the VMI Corps of Cadets. The Board of Visitors directed the Committee to examine the Institute's mission, and the relationship between its admission policy and achievement of that mission. Tr. 948-49 (Spivey).

4. The Mission Study Committee was comprised of seven persons, three of whom who were VMI alumni. The Committee included a female, Dr. Virginia Lester, then President of Mary Baldwin College. Tr. 949-50 (Spivey).

5. In preparation for their deliberations, the Mission Study Committee read materials on education and on women in the military. They made site visits to single-sex and newly coeducational institutions.

6. On the visit to West Point, the Committee met with the Special Assistant to the Superintendent for Policy and Planning, the Director of Admissions, representatives of the Commandant, Director of the Center for Leadership, the Special Assistant to the Commandant for Honor, the Dean, the West Point historian and other selected officers and cadets, as well as with the Superintendent. The discussion focused on the issue of the integration of women at West Point.

7. West Point provided generally favorable information concerning coeducation: (1) male and female cadet attrition occurs for the same reasons; (2)

resentment of female cadets by male cadets has faded and "[a]cceptance is gained on the basis of individual achievement"; (3) VMI graduates will "probably be considered disadvantaged in the coed Army" because they do not come from a coed environment; (4) the introduction of women did not significantly change West Point; (5) women perform and compete as well as men in cadet basic training, cadet field training, and cadet advanced training, which are summer training programs; (6) training for men and women is comparable, but not identical, taking into account gender-based differences; (7) female cadets take the same physical education courses as men, except that they take self defense instead of boxing and wrestling; (8) the cost of educating a cadet did not rise significantly with the admission of women; (9) there had been "no changes in the curriculum, procedures, or facilities of the academic program because of the admission of women"; (10) female cadets have had no trouble with the West Point honor system. "Women are underrepresented in honor offenses," and "[t]he system is applied equally to men and women"; and (11) gender integration has been successful, and "women's accomplishments have excelled all anticipated levels." U.S. Ex. 68.

8. In its visit to the Naval Academy, the Committee met with the Superintendent, the Dean of Admissions, the Academic Dean, the Acting Commandant, the Professional Development Officer and other selected officers and midshipmen of both sexes. Once again, the Committee explored a whole range of issues regarding the integration of women into the Corps—issues such as gender discrimination, discipline, academic performance, fraternization, inte-

gration into the plebe system and honor system, recruiting requirements and modifications of the physical regimen. The committee was told that: (1) "[t]here have been no changes in the Naval Academy academic program because of the introduction of women"; (2) the plebe indoctrination system of the first year "imparts stress and pressure for the entire first year," and "[w]omen are totally integrated into the entering class except for the obstacle course and some of the physical aptitude exercises"; (3) "[t]he success rate of midshipmen at the Naval Academy depends on a combination of academic rating, conduct rating, and performance rating," and "[m]ale and female midshipmen do equally well;" (4) although the Naval Academy modified its physical aptitude entrance requirements for women, male physical standards were not changed; (5) women are a minority at the Naval Academy, and some deal with this effectively and some have a hard time; and (6) "[t]he relationship between male and female midshipmen becomes more harmonious each year. Total acceptance has taken a long time; some midshipmen are more ready to accept women than others." *Id.* The Acting Commandant stated that "[n]othing has changed at the Academy except some physical training requirements and some facilities. Women have performed very well at the The Naval Academy and women have met same academic standards as men." *Id.* p. 6.

9. The Committee also visited Washington & Lee University for an interview with Dr. John D. Wilson, president of that institution. There, the Committee learned that: (1) the decision to admit women to that institution was "based on the need to maintain and improve academic quality. . . ."; (2) "the honor

system based on a 'closed society of shared values' would not be threatened. . . ."; and that (3) due to its changed admissions policy, better qualified students are expected to be attracted to the institution and that as a result the quality of life there will improve. U.S. Ex. 92C. Significantly, Dr. Wilson made the following observation:

> A severe life of military discipline is at the core of the VMI experience. There is pride in mutual suffering which binds the classes together. If women were admitted, the system would have to be modified. The entire system would not be destroyed, but modifications would be inescapable.

Id.

10. Mr. Casteen participated in the introduction of coeducation at the University of Virginia, and visited the federal service academies to obtain information on how those institutions were preparing to integrate women. He characterized the introduction of coeducation at the University of Virginia as a "very positive experience." U.S. Ex. 69. He stated that, contrary to expectations, female students at the University of Virginia tend to enroll in the strongest departments and superior programs including engineering and architecture. *Id.* He pointed out that "all male colleges which have admitted women have been strengthen[ed] by women. . . ." *Id.* at 2. He emphasized the role of an institution's leadership in the admission of women: "[I]t happened [at the University of Virginia] because top leadership made it happen." *Id.* at 3. Most tellingly, he stated:

> [T]he success rates of women at the USMA have been extraordinary. He stated that it was his observation that women will conform and

excel in any environment. He added that their success will depend on the application of the internal discipline system and whether or not it is applied equally to all cadets. He pointed out that at UVA, women were not assigned to separate dormitories but housed in coed dorms.

* * * * *

VMI represents the idea that every citizen is a soldier on demand, and this should include women. . . . Thus, he stated, the Institute has a chance to provide leadership in this regard by training women for military service.

Id. at 2, 3.

11. The Mission Study Committee issued its final report in May 1986. It "found no information that would warrant the change of VMI status as a single-sex college." The Report provided very little indication of how this conclusion was reached. VMI Ex. 40. The one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI. *Id.* p. 2-3. One paragraph of this analysis epitomizes the current position of the VMI defendants in this litigation:

> The presence of women at the Institute would not alter the program academically; however, there would have to be some adjustments made in the military and physical demands made upon male cadets. Because many of these demands contribute to the ethos of which the Virginia Military Institute is proud and which, it is firmly believed, contributes to the unity of the Corps, there is doubt that the same spirit could

> be maintained at the same level in the same way if women were introduced into the Corps.

Id. p. 2.

12. The Report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools on Virginia Military Institute (March 16-19, 1986) provides:

> The visiting committee found that although the statement of purpose had not been changed since the last self-study, the Board of Visitors assisted by staff of the Institute is reviewing VMI's mission. This review has been thorough and has included visits to other institutions with review of their mission and purpose statements. The committee commends the Board and VMI administration for recognizing the need for periodic review of the Institute's purpose and for engaging in activities necessary to modify that statement of that purpose as may be indicated.
>
> As the self-study states, the Institute's Mission Statement has served it well over the years. As an institution approaching its 150th birthday, the Mission Statement reflects the constant purpose of VMI to provide a distinctive and superior academic program conducted in and facilitated by a rigorous system of military discipline. Graduates of the Institute come to know this mission in a very personal way by their participation in VMI's unique system. The graduates as products of their system have by their achievements brought distinction to the Institute. . . .

VMI Ex. 35 at 5, 12.

13. The Mission Study Committee of the Board of Visitors of the Virginia Military Institute found that

the admission of women into the VMI Corps of Cadets would alter the mission of VMI. It considered the reasons that other institutions had changed from single-sex to coeducational status. It found the motivation to be mixed and further found that none of the motivating factors of the other institutions applied to the VMI mission. VMI Ex. 40 at 2.

14. This evidence amply supports a finding that VMI's mission was established early in the life of the institution, and has been continued only after reasoned and careful analysis by the Board of Visitors.

V. *Mission of Military Unit at VPI*

1. The purpose of the VPI Corps of Cadets "is to produce men and women of the Virginia Polytechnic Institute and State University who are honorable, educated and trained for military service to their country and prepared to be effective leaders in the varied work of military and civil life." Stip. 152; Tr. 460 (Musser); U.S. Ex. 57.

2. VPI has approximately 18,000 students, roughly 40% of whom are women. Its Corps of Cadets, a residential ROTC unit, now contains 394 cadets, including 67 women. Tr. 443 (Musser).

3. All unmarried VPI students enrolled in the ROTC program must live in the residential hall. Married cadets are not required to live in the hall. Tr. 472 (Musser).

4. Females first entered the VPI Corps of Cadets in the fall of 1973 and were assigned to a separate unit within the Corps. In February 1979, "the female cadets were integrated into the eight regular line units. . . . Concurrent with the integration of the female cadets, a female version of the male uniform was authorized, thereby bringing about a

greater uniformity in the attire of Corps members." U.S. Ex. 60.

5. There are no differences on the basis of gender in admission requirements to the Corps, in participation in the Corps, or in physical accommodations for cadets. Tr. 469-70 (Musser). Female cadets at VPI have, at one time or another, held every leadership position in the Corps, including regimental commander, which is the most senior position. Stip. 156; Tr. 447-48.

6. The typical weekly schedule for members of the Corps is the same for men and for women. Tr. 450; U.S. Ex. 51, Reg. 3.1. Each morning one battalion, consisting of 250 cadets, forms up and marches to breakfast. After breakfast, cadets start their academic day which normally runs until 4:00 or 5:00 p.m. At 5:00 p.m., there is a retreat ceremony, and cadets are required to be in their rooms at 7:00 p.m., with lights out at 11:00 p.m. Tr. 448-49. Cadets must be in uniform all day. Tr. 450 (Musser).

7. Each new cadet goes through new cadet training, also called "cadre week," which takes place about eight days prior to the entry of all other freshman into Virginia Tech. Tr. 450-51; U.S. Ex. 77. Cadre week is a "tough week of learning," which involves classes, marching and drill lessons, lectures on the honor code, and athletics. It starts early each morning and ends about 11:00 p.m. Tr. 451. Without any distinctions, men and women participate in the same activities during cadre week. Tr. 452 (Musser).

8. The new cadet system, which is mandatory for all entering cadets, runs until sometime between Thanksgiving and Christmas, when the new cadets are recognized as a class by the upperclassmen. The

new cadet system includes daily calisthenics, exercises, runs, and other athletics. Women are required to participate in the same calisthenics, exercises, and runs as the men, although some allowances are made for gender differences, particularly with regard to upper body strength. Both men and women participate in all parades and drills. Tr. 454-56 (Musser). In sum:

> All VPI Cadets must successfully master in their first year a basic training program. The basic training program is a rigorous challenge, physically and mentally. It is intended to place all cadets on equal footing; teach fundamentals of military courtesy and discipline; impress upon cadets military customs, ideals, and esprit of the Corps and instill respect for authority, self-reliance, and develop leadership potential. VPI believes that completion of the training program also serves as a binding element between and among cadets.

Stip. 155.

9. The new cadet system requires memorizing "new cadet knowledge," which is information about the Corps that cadets must be able to recite to upperclassmen on demand. If a cadet does not know certain information when he or she is asked, that cadet can be required to do push-ups or, in some cases, marching tours. A tour is a one-hour march around the barracks with five-minute breaks every twenty minutes. Both men and women can be subjected to push-ups or tours. Tr. 457-59 (Musser); U.S. Ex. 16.

10. The Corps' honor code states: "I will not lie, cheat or steal nor tolerate those who do." Tr. 461-62; U.S. Ex. 57. The Corps' disciplinary system is modeled after the Uniform Code of Military Justice, and it applies equally to men and women. Tr. 462.

11. The VPI Corps is organized along Army lines, but a system of class privileges also exists. These entitle upperclassmen to greater freedoms as they progress. Tr. 463-64 (Musser); U.S. Ex. 57.

12. Both male and female cadets are subject to scheduled and unscheduled room inspections. Failure to pass inspection results in demerits. No distinctions are made on the basis of gender. There are no restrictions regarding who can visit the cadet dormitories, but visitors must be escorted. Tr. 466-68 (Musser); U.S. Ex. 57.

13. The Corps has a dyke system similar to VMI's, the primary difference being that VPI uses juniors and VMI uses seniors. Both males and females participate in this mentor system. Tr. 468-69 (Musser).

14. Two floors in each building house other students who are not cadets. These students share the same facilities throughout the buildings with the cadets. Tr. 465-66 (Musser).

15. In a section of one of the residence halls, where the regimental cadet staff is housed, the men and women share the same bathroom, although not at the same time. There currently are four men and two women on the regimental staff. Tr. 427, 473 (Musser).

16. VPI cadets eat in the same mess hall as other students, although there is no section set aside for the Corps. Other students can also eat in that section. By contrast, cadets at VMI eat together in one large

facility that accommodates all of them. VPI cadets normally eat both breakfast and dinner together. Tr. 428, 457 (Musser.)

17. The institutional environment of the VPI Cadet Corps differs greatly from that of VMI. Because only 2-3% of VPI students live in the Cadet Corps barracks, the military experience is more diffuse. Tr. 336 (Conrad).

18. Because VMI is a small place with 1,300 students, and VPI is a "multiversity" with 18,000 students in graduate as well as undergraduate courses, it offers its students a different educational experience. Tr. 359 (Conrad).

19. The most dramatic differences between VMI and VPI concern the operation of the respective Corps. VMI emphasizes uniformity, hierarchy, and the adversative method. VPI recognizes individual differences and is more informal. Tr. 361 (Conrad). VPI uses "positive motivation" rather than the "negative motivation" used at VMI. Tr. 474 (Musser).

20. The differences between VPI and VMI's educational experiences outweigh the similarities, independent of gender. Tr. 363-64 (Conrad). Thus, the programs have similar goals but very different methods. This leads to two conclusions: (1) Women are denied a unique educational opportunity that is available only at VMI; and (2) The success of women at VPI sheds little light on whether women would be successful at VMI.

VI. *Contrasting Mission of Federal Service Academies*

1. The mission of the federal service academies is to prepare cadets for career service in the armed

forces. This is very different from the mission of VMI, which is directed at preparation for both military and civilian life. Only about 15% of VMI cadets enter career military service. Tr. 410-11 (Conrad); Riesman Dep. 98-99.

2. VMI has gone to considerable lengths to assure the public that it is not simply a military college. Tr. 342-43 (Conrad).

VII. *Differences Between Men and Women*

A *Gender-Based Physiological Differences*

1. When Congress made the decision to admit women at West Point, they instructed the Military Academy, in effect, to change whatever standards needed to be changed in order to accommodate physiological differences between men and women. West Point has identified more than 120 physiological differences that exist between men and women, and tries to accommodate those differences to the minimal extent necessary. Tr. 510-11, 513 (Toffler).

2. The physiological differences between males and females identified by West Point's Office of Institutional Research are very real differences, *not stereotypes*. Tr. 519 (Toffler).

3. Most men perform far better than most women in activities which require explosive power, e.g., sprinting, basketball throw, medicine ball put, and jumping events. Even when size is held constant, females are, on the average, only 80% as strong as males. VMI Ex. 119 at 26.

4. The speed of movement in women is, on the average, slower than in men. VMI Ex. 119 at 27.

5. Aerobic capacity relates to the ability to consume and utilize oxygen. The number of liters of

oxygen one can effectively metabolize on a minute-by-minute basis indicates the fitness level of a person. Using the applicant pool of individuals for induction into the U.S. Army, Dr. Paul Davis, VMI's expert in human physiology, determined that for high fitness level requirements, such as those for military firefighters, infantrymen, and most of the combat arms, 5% or fewer median college-age females would possess the requisite fitness level to perform those jobs, as compared to 85% of median college-age males. Approximately 15% of median college-age females can perform activities requiring medium aerobic capacities. Approximately 95% of median college-age males can perform activities requiring medium aerobic capacity. VMI Ex. 59A; Tr. 886-88.

6. High maximal lifting capacity refers to the ability to lift 50 kilograms to a height of 132 centimeters of distance, which corresponds to the tail board of a military truck. Approximately 7% of median college-age females possess high maximal lifting capacity, as compared with approximately 80% of males. Approximately 50% of median college-age females can engage in activities requiring a medium maximal lifting capacity, while 100% of median college-age males can engage in such activities. VMI Ex. 59B; Tr. 888-90 (Davis).

7. On the average, college-age females possess approximately 10% more body fat than college-age males. Body fat imposes a burden on some kinds of physical performance. VMI Ex. 59C; Tr. 89-92 (Davis).

8. On the average, college-age females perform a two-mile run approximately three minutes slower than the median for college-age males. VMI Ex. 59D; Tr. 893-95 (Davis).

9. The median college-age female is not capable of performing push-ups equivalent to that of the median college-age male. Of the females tested, none was able to come close to meeting the push-up requirement of the VMI physical fitness test. The maximum number of push-ups by a female was 18, compared with a minimum requirement of 45 push-ups on the VMI fitness test. VMI Ex. 59E; Tr. 894-95 (Davis).

10. There is no data available to compare the performance of males and females with respect to pull-ups because only the Marine Corps has a requirement for pull-ups. Dr. Davis testified that the female is at a distinct disadvantage as far as the performance of that activity, and the difference between performance of the genders in this activity is 500-1000 percent. The minimum requirement for pull-ups for the VMI physical test is five. Tr. 896.

11. Dr. Davis examined aggregate data related to injuries incurred among a group of 2,400 persons participating in Army basic training. Army basic training has a duration of eight weeks, while the VMI rat line has a duration of about seven months. The data shows that physical fitness and avoidance of injury are correlated; as one's fitness level improves, the incidence of injury goes down. However, regardless of fitness level, differences exist between males and females across the board in that females suffer injuries more frequently than males. Tr. 907-13.

12. Median college-age females tend to sustain injury up to eight times the rate of median college-age males when engaged in the same or similar physical activities. VMI Ex. 59G to 59O; Tr. 909-13 (Davis).

13. By the most conservative estimate, the lost time that females would suffer due to injuries—based on the Army model—is 480% greater than the lost time experienced by males in Army basic training. Tr. 913 (Davis). Despite the higher injury rate for women (and despite the additional disability leaves associated with pregnancy), a 1978 Navy study found that male soldiers are, on the average, more likely to be absent from duty a particular time, principally because men are much more likely to be suspended for disciplinary related reasons. U.S. Ex. 18.

14. Comparison of the United States Military Academy classes of 1989 and 1981 male and female cadets on the Army physical fitness tests, USMA indoor obstacle course test, and the USMA physical ability test, shows the following:

(a) Seven of eight physical tests show half (50th percentile) of the women performed below the bottom five percent of the men. The single exception is the Army physical fitness sit-up test, which was almost identical for the two groups.

(b) Three-quarters (75th percentile) of the women performed below the bottom five percent of the men in the indoor obstacle course and physical ability test push-up, standing long jump, modified basketball throw, and 300-yard shuttle run test.

(c) The 75th percentile of women for the class of 1989 Army physical fitness test push-up performance was equal to the 8th percentile performance for the men; and the 75th

percentile women for the class of 1981 performance was equal to the 13th percentile performance for the men.

(d) For the Army physical fitness test two-mile run, the 75th percentile women for the classes of 1989 and 1981 performance was equal to the 22nd and 13th percentile men, respectively.

VMI Ex. 157.

15. West Point has concluded that males outperformed the females on all of the common physical aptitude tests, and that competition between the two groups on the basis of raw scores would severely limit the admission opportunities for women. VMI Ex. 166, at 3.

B. *Gender-Based Developmental Differences*

1. According to Dr. Richardson, the "nature of an experience that is growth-producing for a majority of women, according to the literature, is one that is supportive, is one that emphasizes positive motivation. I'm not saying that some women don't do well under adversative model, undoubtedly there are some who do, but you [do not] design educational experiences around the exception. You have to design them around the rule, and I think you would find that the doubting model . . . the adversative model . . . would have to be gradually adapt[ed] so that it incorporated more of the positive motivation, positive reenforcement." Tr. 702.

2. A substantial body of contemporary scholarship and research supports the proposition that, al-

though males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated. VMI Ex. 73; Tr. 376-77 (Conrad), 686-87, 692-93 (Richardson); Riesman Dep. 13, 57-67.

3. The literature regarding developmental differences between males and females and the advantages of single-sex education contained in VMI Ex. 73 reflects the work of only a small portion of the academics who, in recent years, have suggested that there are important differences between men and women in learning and developmental needs. Tr. 376-77 (Conrad).

4. Given these developmental differences females and males characteristically learn differently. Males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students. Riesman Dep. 63-65, 95, 106-07; Tr. 684-87, 692-93 (Richardson); VMI Ex. 73B, D, E, and G.

5. Commenting on the scholarly literature and empirical evidence that single-sex education is desirable in light of gender-based developmental differences, the government's expert, Dr. Conrad, described the gender differences identified by researches as "tendencies." He emphasized that the attributes of males and females *in individual cases* may diverge from these average tendencies. In other words, there are exceptions to the general rule. Tr. 377, 380 (Conrad).

6. Colonel Toffler of West Point has observed the psychological and sociological differences between

males and females during his study of the integration process at West Point. He attributes the slightly higher attrition rates for females at West Point, in part, to gender-based sociological differences. West Point attempts to accommodate the distinctive psychological and sociological needs of women. The psychological and sociological differences between men and women are real differences, not stereotypes. Tr. 513-16, 519, 545-50 (Toffler).

7. During his trial testimony, Dr. Conrad not only acknowledged the broad empirical support for the value of single-sex education, and also described himself as a "believer in single-sex education." Dr. Conrad commented that single-sex education has great virtues for many people under many conditions. Tr. 373. In response to a question from the Court, Dr. Conrad stated that his advocacy of coeducation at VMI was based on a philosophical preference for openness in public institutions, and not on considerations of educational quality. Tr. 382.

8. Single-sex educational opportunities are valuable for both males and females. For many men, a single-sex college is optimal. At an all-male college, adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension. Riesman Dep. 38-39; Tr. 986-87 (Bunting).

9. Single-sex schools for adolescent men are effective where discipline is maintained and sound role models are present. Riesman Dep. 95, 107; Tr. 693 (Richardson).

10. According to the research of Alexander Astin, based on data from the early 1970's, single-sex colleges show a pattern of effects on both sexes that is

almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life compared with their counterparts in coeducational institutions). Men's colleges substantially increase the likelihood that men will carry out career plans in law, business and college teaching; they also have a substantial positive effect on starting salaries in business. Women's colleges increase the chances that women will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees. Alexander Astin, *Four Critical Years*, (1977); admitted as VMI Ex. 73I.[3]

11. Astin's research indicates that students are able to invest more energy in academic pursuits and in interaction with faculty in single-sex colleges because they have few opportunities to dissipate energy in courtship activities. In all likelihood, heterosexual activity is more circumscribed—confined to weekends, for example—in single-sex colleges. VMI Ex. 73I, K, L, M, P, Q, and R; Riesman Dep. 54, 109; Tr. 986 (Bunting).

12. Research also shows that students attending single-sex colleges are more likely to take the risk of choosing a career normally associated with the other sex than are students in coeducational colleges. Marvin Bressler and Peter Wendell, "The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations," 51 *Journal of Higher Education* 650 (1980); admitted as VMI Ex. 73J.

[3] Astin's research was cited favorably by Justice Powell in his dissenting opinion in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 738-39, 102 S.Ct. 3331, 3343, 73 L.Ed.2d 1090 (1982). The volume was properly admitted as a trial exhibit in this case.

13. Astin has written that, with respect to single-sex colleges as compared to coeducational colleges, the greater interaction with faculty and greater satisfaction with the collegiate experience, despite the constraints on social life, may result from the greater sense of identification and communal feeling when both students and faculty are predominantly of the same sex. VMI Ex. 73I; *see also* VMI Ex. 73K, L. M, and Q.

14. Single-gender schools facilitate their students' focusing on education by screening out distractions. Thus, the single-gender nature of VMI is directly related to its goal of focusing cadets' energies on development of leadership values. Tr. 694, 729-31 (Richardson); Riesman Dep. 54, 62-63, 94.

VIII. *Anticipated Effects of Coeducation on VMI*

1. A coeducational VMI would offer neither males nor females the VMI education that now exists. The changes would substantially affect the method now used to educate citizen-soldiers. Tr. 804 (Bissell), Dep. 101 (Riesman), 676-77 (Richardson).

2. Colleges that face a major change in clientele typically change their methods in three stages:

> The first stage involves removal of the barriers that barred a particular group or class of students from admission.
>
> The second stage involves efforts to help the new class of students succeed, through such

measures as recruitment efforts and support services.

The third and final stage involves recognition that the institution cannot attract sufficient numbers of the new class of students to make their experience beneficial without modifying the institutional experience. As a result, at this third stage, the institutional experience, even its mission, is altered in order to conform to the developmental needs of the changed clientele.

Tr. 696-98 (Richardson).

3. The admission of women at VMI would represent a "dramatic clientele change." Tr. 368 (Conrad).

A. *Demand for VMI Education Among Women*

1. Trial testimony included a great deal of speculation, but very little evidence, on demand for a VMI education among women. This uncertainty is due to a lack of recruitment among women.

2. VMI engages in extensive recruiting activities, including visiting high schools to "spread the word about the valuable education" it offers. Tr. 42 (Knapp).

3. Alumni also perform substantial recruitment activities. Their efforts to date have been aimed exclusively at male applicants. Tr. 172 (Sandy).

4. Typically, VMI representatives set up tables at high schools and offer materials regarding VMI. Women who stop by are told that VMI accepts only male applicants. VMI does not keep any records of either the names or the number of women who stop by. Tr. 44 (Knapp).

5. In the past, VMI responded to inquiries from females by sending letters explaining VMI's male-only admissions policy. In the last two years, Lt. Col. Sandy has been instructed not to respond in any fashion to inquiries from females. Women who send written inquiries to VMI now receive no response at all. Tr. 193-94.

6. Between 1988 and 1990, VMI received inquiries, test scores, or other requests for information from 347 women. Because VMI did not respond to them, the seriousness of these inquiries cannot be determined. U.S. Ex. 104, 105.

B. *VMI's Special Recruitment of Blacks*

1. VMI has distributed a recruitment booklet aimed specifically at black students. U.S. Ex. 79. VMI also attends specific programs for minority students, purchases names from the college board of black students with SAT scores sufficient for admission to VMI, and targets specific high schools to recruit black students. VMI targets black students because it likes "to have students of different backgrounds, racial backgrounds, ethnic backgrounds in the school," and because recruiting black students is one of the objectives set forth by the State Council on Higher Education. Tr. 173-74 (Sandy).

2. Some special steps are taken to address the needs of black students. VMI's 1990-91 budget includes $22,000 for expenditures on "Retention of Black Cadets." U.S. Ex. 3 at 28.

VMI's self-study reported:

A program for the retention and effective performance of black freshmen was initiated in the

fall of 1983. The primary objective was to insure the students' success in the basic disciplines of mathematics and English. The program is thus designed primarily to offer the student crucial academic support. Experience gained during the first year of the Cadet Retention Program indicates that black freshmen also need and certainly will appreciate, outside a formal academic context, opportunities to discuss their shared experiences as new, minority members of a dominantly white and tradition-oriented student body. This apparent need and the similar one of other black cadets is also addressed. . . . Social-cultural support and black student morale within a dominantly white institution are important secondary concerns of the program.

U.S. Ex. 24, at 57-61.

3. VMI offers a three-week college orientation workshop to black (male) high school students. The program is intended to get students interested in going to college in general, and in attending VMI in particular. The students live in the barracks, attend classes, and go through demanding physical training "to show them what it might be like at VMI." Tr. 308, 312-13 (King).

4. The Promaji Club, one of about 70 extracurricular clubs at VMI, is organized as a club following the interests of black cadets. Like all clubs at VMI, it is open to all students. U.S. Ex. 79 at 8; Tr. 49 (Knapp).

5. VMI is currently about 7% black. The special recruitment program for blacks has had little, if any, effect on VMI's method of accomplishing its mission.

Black cadets particularly appreciate the egalitarianism of VMI. Tr. 46-48 (Knapp); Riesman Dep. 79, 81-83.

C. *Recruitment of Women at Other Military Institutions*

1. Currently, approximately 250 women attend residential ROTC military programs, which are based at Texas A & M University, Norwich University, North Georgia College and VPI. VMI Ex. 62L.

2. Four hundred sixty-one women are enrolled at West Point, 423 at the Naval Academy, 532 at the Air Force Academy, and 131 at the Coast Guard Academy. These institutions feature a military curriculum. However, they differ from VMI both in their mission and in that they do not have admission fees and, in fact, pay student salaries while they are enrolled.

3. Dr. Richardson testified that he believed that successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women, or 130 women. This number is apparently based on the experience at West Point, which offers a very different kind of program and has much higher academic standards. Dr. Richardson conceded that the number is highly speculative. Tr. 720-21.

4. Expert estimates of the number of women necessary to provide a good educational environment for women at a formerly all-male school range from 10% to 40%. The 40% figure appears in an October 1990 Report of the Committee on Women's Issues of the United States Naval Academy Board of Visitors, which has a significantly lower number of women at this time. VMI Ex. 67 at 11. The 10%

figure is based on the positive West Point experience, and was accepted by VMI's Mission Study Committee. Tr. 486-87 (Toffler); Stip. 7; VMI Ex. 40 at 2.

5. Of the 1,946 women who applied for admission to West Point in the class of 1992, only 155 were admitted. The female applicants not admitted did not meet the qualifications for admission. The capacity for the class was filled, and in the opinion of the Admissions Committee, filled with the best-qualified applicants, and the high-competition objectives and class objectives had been satisfied. Tr. 484-85 (Toffler).

6. Currently, many men who are denied admission to the federal service academies meet the admissions standards of VMI. However, VMI has found that very few rejected applicants from West Point choose to attend VMI. Tr. 204-05 (Sandy).

7. The federal military academies limit the admission of female students by placing a cap on the number of such students who can be admitted in any one year. The cap is equivalent to the percentage of women presently on active duty in the branch of the armed forces represented by the particular academy. Approximately 10% of the cadets at West Point are women. Stip. 196; Tr. 482 (Toffler).

8. Based on the fragmentary evidence, including VMI's experience with recruitment of blacks, it appears that VMI would be able to achieve at least 10% female enrollment while maintaining its ROTC requirements. This would be a sufficient "critical mass" to provide the female cadets with a positive educational experience.

D. *Need for Privacy*

1. If VMI were to admit women, there would be changes in the barracks culture. Adaptations would have to be made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. Tr. 367 (Conrad); Riesman Dep. 61-62.

2. The introduction of privacy required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else. The honor code would cease to be the absolute boundary between VMI and the outside world because it would become possible for cadets to take action at VMI without being observed. Tr. 701.

E. *Physical Education*

1. If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. Unlike the federal services academies, VMI currently does not use "ability groups" in its physical programs or activities. VMI imposes the same physical requirements on a 150-pound cadet as on a 190-pound cadet. Tr. 788-89 (Bissell).

2. Changes in the physical education program would be necessary if women were admitted at VMI. For example, boxing and wrestling requirements would have to be changed, as would certain aspects of the rat training programs. Either these would have to be abandoned, or there would have to be accommodations that would result in a dual track for women. Tr. 35, 66-67 (Knapp), 896-98 (Davis), 788-89 (Bissell).

3. Currently, 98% of VMI cadets pass the physical fitness test before graduation. Assuming an ap-

plicant pool similar to that at the military academies, approximately 15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test.

4. The goal of physical testing is to design a single program or criteria in such a way as to insure that it represents a reasonable challenge to the greatest number of individuals. Because of the physiological differences between male and female cadets, it would not be possible to design a program that would be challenging to both sexes if it were a coeducational program. A program that would challenge but not discourage female cadets would pose an insufficient challenge for the vast majority of males. Tr. 898-900 (Davis).

5. Female cadets would not be able to perform the tasks in the VMI rat training program at a level comparable to that of male cadets. Because of physiological differences, the majority of females would not be able to complete the tasks associated with the rat line as currently constructed, at the same levels as males. Tr. 906 (Davis).

6. If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males. Tr. 902-07 (Davis).

7. The intensity and aggressiveness of the current program would be reduced if women were admitted and requirements for all cadets were adjusted, and rat training would have to undergo extensive changes. The program's benefit to the morale of male participants would be adversely affected. Tr. 918-22, 930-32 (Davis).

F. *Armed Forces Experience*

1. The Marine Corps trains males and females in separate units at boot camp. The Marine Corps tried using a gender-integrated platoon in officer basic training, but found the experience inferior. One concern was that the program became insufficiently rigorous for males. Tr. 818-19 (Ripley).

2. The Marine Corps also trains men and women in separate summer camps as part of the Marine Corps ROTC program. Tr. 819 (Ripley).

3. The U.S. Army segregates men and women in basic training at the platoon level. They are integrated at the company level. The Army looked at a variety of combinations and determined that segregation was appropriate for basic soldier training. Tr. 616 (Toffler), 786-788 (Bissell).

C. *West Point Experience*

1. When Congress passed a statute requiring the federal service academies to admit females, it directed the academies to make the adjustments necessary to accommodate the physiological differences between men and women. Tr. 510-11 (Toffler).

2. Since admitting women, West Point has modified basic training to break it into groups according to ability. Tr. 601-03 (Toffler).

3. Since the admission of women, West Point has adopted the concept of comparable or equivalent training. The physical activities assigned to women and to men differ, but have comparable training benefit for the people who go through them. An example would be boxing for males versus self-defense or judo for females. Another example is pull-ups for males versus the flexed arm hang for females. Tr. 609-10 (Toffler).

4. Prior to the admission of women, recondo training (i.e., various strenuous activities, including a forced march with a pack) was part of cadet field training. Recondo training is no longer conducted during field training. Tr. 606-07 (Toffler).

5. Prior to the admission of women, running exercises were conducted wearing combat boots. Subsequently, a change was made so that running exercises were conducted in running shoes. Prior to the change, women were suffering a significantly higher injury rate in cadet basic training. Tr. 608-09 (Toffler).

6. Since women have been admitted at West Point, physical training no longer includes running events in which cadets carry weapons. Tr. 604-06 (Toffler).

7. Since the admission of women, the indoor obstacle course that cadets run as part of their training has been modified to remove certain events and replace them with others. The events that were removed were events that required upper body strength. One of the reasons these events were eliminated was concern that women would be psychologically discouraged by them. Tr. 607-608 (Toffler).

8. If women were admitted to VMI, there would be changes in physical education requirements to reflect physiological differences. Coeducation would also affect physical training, which is incorporated into the rat system. Tr. 366 (Conrad).

9. At VMI, there are intense physical demands placed on cadets. Given the biological differences between men and women, changes would have to be made to adapt the physical demands to the capabilities of women. VMI would have to make the changes analogous to those that have been made at the service academies, and might find it necessary to introduce the concept of comparable training used at West Point. Tr. 366-67 (Conrad).

H. *Impact of Gender Classes*

1. The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way. VMI Ex. 58 (Richardson Report) at 22.

2. There are approximately 66 approved clubs at VMI. Consistent with the egalitarian ethic, VMI prohibits the exclusion of any cadet from membership in any club. VMI also has a policy that prohibits fraternities and secret societies. The significance of those policies lies in "the egalitarian aspect that every cadet must be exactly the same, treated alike and attend or go to any club or facilities that may be available to them, but a total egalitarian approach." Tr. 790-91 (Bissell).

3. Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism. Tr. 698, 701-02 (Richardson).

4. If women were admitted to VMI, class differences between male and females would be introduced. These differences would appear in physical training. Tr. 367-68 (Conrad).

5. If women were admitted to VMI and housed in a separate barracks, they would miss the VMI experience. It would provide women with an undesirable experience in which their second-class citizenship would be emphasized. Some military institutions that

have tried housing women in separate quarters, and found that it simply does not work. In order to achieve results satisfactory to them, they must be integrated rather than isolated from the experience. Tr. 706 (Richardson).

6. The admission of women at VMI would undermine the ethic of egalitarianism by creating jealousies and concerns about whether people were being treated equitably. Cross-sex relationships, dating, and aspirations are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute of the VMI system. Tr. 731 (Richardson); Riesman Dep. 60-61.

7. Since the admission of female cadets at West Point, studies have consistently shown that cadets of both sexes perceive treatment as unequal. This perception gives rise to jealousy and resentment among cadets. Tr. 518-19 (Toffler); VMI Ex. 91, 92, 103.

8. Survey data compiled by West Point indicates that some cadets do not accept the concept of comparable or equivalent training because they resent the fact that they have to do something at one level while another person does not have to meet the same standard. Tr. 610-11 (Toffler).

I. *Impact of Cross-Sex Relationships*

1. Dr. Richardson testified: "[VMI] does what it does because it has an isolated cloistered environment that focuses on a very narrow range of purposes. . . . [It] uses a developmental process that is attuned to male developmental needs during the period of adolescence. [The admission of women would] inject . . . into that environment the necessity of coping with cross sex relationships, . . . especially at a very vulnerable period of development [when] people are in fact trying out the relationships that will characterize their future life in society. . . . [The VMI system] considers only how you develop a particular gender and it is focused in every part on . . . optimizing that development." Tr. 729-30.

2. Admission of women at VMI would produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience. Tr. 700-01 (Richardson).

3. Cross-sex interaction and relationships would inject a new and distracting developmental aspect into an environment at VMI that currently excludes that aspect and focuses narrowly upon other aspects of development. Tr. 700-01, 729-31 (Richardson).

4. Equal treatment is much more likely to be obtained in a single-sex setting. Cross-sex relationships, dating, and aspirations are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute to the VMI system. Riesman Dep. 60-61.

J. *West Point Experience*

1. The VMI Mission Study Committee determined that integration of women at West Point was made possible by the Academy's move away from its adversative new cadet system to a much more developmental style of training and emphasis on positive leadership. The change coincided with Army-wide changes in leadership style. U.S. Ex. 68.

2. The first women were admitted to West Point in the summer of 1976 and graduated with the class of 1980. The admission of women, at that point, resulted from legislation signed by the President in

1975. Prior to that time, West Point's position on the admission of women was one of opposition. Tr. 482-83 (Toffler).

3. At West Point, dating between cadets is generally permitted except that fourth class cadets must date within their class and all cadets are precluded from dating within the chain of command. West Point has conducted no study to determine the impact of dating on the discipline of the Corps of Cadets. Tr. 623-25 (Toffler); VMI Ex. 146 at 2-3.

4. The doors at West Point on cadet rooms are solid and equipped with locks. Cadets are permitted to close their doors unless there are only two cadets in the room at a particular time and the cadets are of the opposite sex. Tr. 627-28 (Toffler).

5. West Point regulations require that a person desiring entry to a cadet's room must knock and await acknowledgment before entering. VMI Ex. 146 at 2-4.

6. At West Point and Virginia Tech, unlike VMI, there are doors on the toilet partitions separating the toilets. Tr. 432-33 (Brewer).

7. West Point is not concerned with eliminating all visible financial distinctions among cadets. Tr. 626-27 (Toffler).

8. West Point abolished the new cadet system, or fourth class system, in 1990. Under the current program, fourth class cadets are assigned a faculty member as mentor. After cadet basic training, which is the 6-8 weeks before the start of the academic year for new cadets, West Point has reduced the amount of memorizing and reciting information about West Point's history and traditions by new cadets. West Point has also acted to eliminate practices such as upperclassmen yelling at and disciplining new cadets, requiring them to run personal errands, bracing (sitting with chin tucked in the cavity of one's neck) during meals, and requiring physical activities such as push-ups. Tr. 616-20 (Toffler).

9. With the admission of women, West Point modified regulations relating to uniforms, hair length and jewelry, Tr. 625-26 (Toffler).

10. Under West Point's regulations, if a subordinate believes that a senior is operating improperly, it is within their place to discuss that with the senior. Tr. 595-96 (Toffler).

11. Hazing of new cadets, including demeaning or insulting activity, and requiring excessive physical performance, are examples of improper senior-subordinate interaction, which are not permitted at West Point. Though such interactions were technically improper prior to 1990, they were common practices and were part of the new cadet system. Since 1990, the prohibition on these activities has been enforced. Tr. 619-23 (Toffler).

12. The abolition in 1990 of new cadet, or fourth class, system at West Point, and the substitution of a new system, were designed to eliminate the application of stress upon fourth class cadets by more senior cadets. The new system uses positive motivation, instead of stress, as a means of leadership development. The new leadership development is designed to function for all four years of the educational experience, rather than being focused upon the first year.

K. *Educational and Military Systems*

1. Experts are in general agreement that coeducation would have little or no effect on ROTC program

at VMI. If anything, the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army. U.S.Ex. 68.

2. Coeducation would have some effect on the educational programs at VMI. For example, women might suggest different reading in literature courses. This effect would not be likely to change either the quality or the mission of VMI. Tr. 365-66 (Conrad).

L. *ROTC Programs*

1. To enroll in the Air Force ROTC program, a cadet must pass the Air Force officer qualifying test, a 5½ hour test that resembles the SAT. This is the same test administered to every Air Force officer candidate throughout the United States. The test can be retaken up to three times, with six-month intervals between each. About 15% of the cadets fail the test the first time. Tr. 218-20 (Williams).

2. Cadets must also pass a physical, which is set by the Department of Defense and administered to all applicants for commissioning in the armed forces. Tr. 222.

3. The academic requirements for VMI's Air Force ROTC program are the same as those at any other undergraduate institution in the United States. Tr. 223.

4. The Air Force ROTC program also includes weekly leadership labs, which is partially waived at VMI because VMI "picks up the responsibilities for training our cadets on the techniques of marching, drill, those type of things." Leadership lab is required by the Air Force of all ROTC cadets. Tr. 223-24 (Williams).

5. The Air Force ROTC physical fitness test given to VMI cadets is the same test that is administered by any other undergraduate institution of higher education which offers ROTC to all students in that program. If a cadet cannot pass the physical fitness test by the end of his sophomore year, he cannot attend the summer field training. If he does not attend the field training, he cannot become an officer. The Air Force sets the requirements for the physical fitness test. With the exception of pull-ups, women and men perform the same events in this test; women do the flex arm hang rather than pull-ups. Scoring of the events is different for men and women. Tr. 225-29 (Williams).

6. The summer field training program is a "four-week summer encampment," and he likened it to "a modified rat line." Women attend the same camps, are subject to the same "modified rat line," participate in the leadership reaction course work, and participate in the other physical training he described. Approximately 25 to 30 female ROTC students would participate in the same training as men at each summer camp at each base. Thus, VMI cadets attend and take the summer camp training side by side with females. Tr. 229-32 (Williams).

7. Students in the University of Virginia's Army ROTC program are required to take certain ROTC classes, including a leadership laboratory once a week, as well as a two-day field training exercise each semester. They are required to participate in a physical training program of their own choosing. Each semester they must take and satisfactorily complete the Army physical training test. Tr. 247-48 (Randall).

8. All ROTC students must take and pass the Army physical fitness examination several times, including prior to summer training camp. Tr. 249-50, 253. Male and female students take the ROTC academic courses, and do the same exercises for the physical fitness exam. Tr. 254. Standards for the physical fitness examination differ by age and sex. Tr. 253 (Randall).

9. Cadets must attend the summer training camp between their junior and senior year. The six-week evaluation and training program is "very strenuous." Both male and female ROTC students participate in summer camp training, both are subject to the same physical and psychological stress, and both successfully complete the program. Tr. 257-62 (Randall).

10. Seventy-four students participate in the Army ROTC program at the University of Virginia (UVA), 11 of whom are females. Tr. 253-54 (Randall).

11. The Air Force ROTC requirements at UVA are substantially the same as those at VMI. UVA Air Force ROTC students participate in the summer training camp as VMI cadets, and female students successfully complete the program. Tr. 273, 275. Of 90 cadets participating in the UVA Air Force ROTC program, 19 are females. Tr. 273 (Stickell).

M. *Physical Facilities*

1. Defendants stipulated that "the VMI Barracks can be altered from a physical point of view to accommodate females." Tr. 414 (statement of counsel).

2. At West Point, male and female cadets occupy identical rooms side by side in the barracks. There are no designations as to which rooms are occupied

by males or females, and separate gang shower rooms and gang toilet rooms are used by males and females. There are no differences between the facilities for men and women. Tr. 421-23 (Brewer).

3. With the exception of the fact that cadets at VMI roll up their mattresses during the day, the cadet rooms at VMI are similar to the cadet rooms at West Point. Tr. 424 (Brewer).

4. At VPI, there are two cadet residence halls. Male and female cadets occupy the same floors and, in some instances, they have rooms adjacent to one another. Separate but identical gang shower and toilet facilities are used by male and female cadets. One gang shower and toilet room was used by both male and female cadets, at different times. When women use this facility, a sign entitled "women" is hung on the door. Tr. 425-27 (Brewer).

5. There are no differences in the physical accommodations for VPI cadets on the basis of gender. All cadet rooms are identical. Tr. 426, 469 (Brewer).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1667
(CA-90-126-R)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLEES

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

No. 94-1712
(CA-90-126-R)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLANTS

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

[Filed Apr. 28, 1995]

ORDER

A member of the Court requested a poll on whether to rehear this case en banc. The poll failed to produce a majority of the court in favor of rehearing.

Chief Judge Ervin and Judges Hall, Murnaghan, Wilkins, Michael and Motz voted to rehear this case en banc; Judges Russell, Widener, Niemeyer and Hamilton voted against rehearing this case en banc. Judges Wilkinson, Luttig, and Williams disqualified themselves. Judge Motz wrote a separate dissent which is attached.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Bert M. Montague
Clerk

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing *en banc*:

More than forty years ago the Supreme Court unanimously held that a state could not constitutionally provide a "separate but equal" education to African-Americans. Yet in a 2-1 decision, a panel of this court has now held that a state can constitutionally provide a separate—*and concededly not even equal*—education to women. In my view, this holding is one of exceptional importance, which merits the careful consideration of every eligible member of the court.[1] Accordingly, I respectfully dissent from the denial of rehearing *en banc*.

Judge Phillips' thoughtful dissenting opinion on the merits of this case and Judge Hall's memorable concurring opinion in *Faulkner v. Jones*, No. 94-1978, slip op. at 25-27 (4th Cir. 1995) (Hall, J. concurring) set forth many of the reasons why I believe rehearing is warranted here. To them, I add the following thoughts.

The panel majority asserts that the Commonwealth must meet a three prong test: (1) the state's objective must be " 'legitimate and important,' " (2) there must be the " 'requisite direct, substantial relationship between objective and means,' " and (3) there must be "substantive comparability of the mutually

---

[1] A majority of my non-recused colleagues in active service agree with this assessment and have voted to hear the case *en banc*. Our local rule, which permits rehearing *en banc* only on the vote of a "majority of the circuit judges who are in regular active service . . . . without regard to whether a judge is disqualified," in this case allows the votes of four, voting against rehearing *en banc*, to defeat the votes of six, voting for rehearing *en banc*. *See* Local Rule 35(b).

exclusive programs provided to men and women." *United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1235, 1237 (4th Cir. 1995) (*VMI II*) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Assuming this is the correct constitutional standard,[2] the panel majority's application of that standard to the facts of this case is confused and contrary to both law and logic.

First, the panel majority appears to identify as the Commonwealth's "legitimate and important" objective the provision of "single-gender education." *See VMI II*, 44 F.3d at 1237 (the first step is "whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective"; the first inquiry is "whether single-gender education constitutes a legitimate and important governmental objective"). However, in *Hogan* the Supreme Court expressly held that the single-gender admissions policy of a state-supported nursing school violated the Equal Protec-

[2] It well may be that classifications based on gender, like those based on race or national origin, must be subjected to strict scrutiny. The Supreme Court has never so held, but only a few months ago the Court reminded us that whether classifications based on gender are inherently suspect and so subject to strict scrutiny is an "open question." *J.E.B. v. Alabama ex rel. T.B.*, 510 U.S., ——, —— n.6, 114 S. Ct. 1419, 1425 n:6 (1994) (quoting *Harris v. Forklift Systems*, 510 U.S. ——, ——, 114 S. Ct. 367, 373 (1993) (Ginsburg, J. concurring)). *See also, Hogan*, 458 U.S. at 724 n.9. Not even the panel majority suggests that the Commonwealth's proposal—to continue funding VMI, yet prohibit women from attending simply because they are women, and instead provide them with a leadership program 35 miles away—could be justified by a compelling state interest or withstand strict scrutiny. It is clear that it could not.

tion Clause. 458 U.S. at 731. The *Hogan* Court may, as the panel majority suggests, have left open the question of whether states could provide single-gender education "in other circumstances," but it clearly did not leave open the question of whether a state-supported single-gender educational program can be constitutionally justified simply because it is a single-gender program. The panel majority itself acknowledges that a "state may not establish a [gender-based] classification for admission . . . *unrelated* to" the purpose of the sort of education that is being provided. *VMI II*, 44 F.3d at 1238 (emphasis in original). Indeed, it is for this reason that the majority notes that "a classification for . . . [a music] conservatory defined by gender would probably not qualify as an appropriate classification." *Id.* Thus, simply providing single-gender education cannot constitute a state's legitimate and important objective for excluding one gender from a state-financed institution.[3]

Rather, there must be some reason why a single gender state-supported institution is necessary to further an important governmental objective. Indeed, those seeking to justify a single-gender admission policy must "carry the burden of showing an 'exceed-

[3] The panel majority views single-gender education as a bona-fide educational "technique," which it well may be in certain circumstances. However, in this case it is, at best, a stratagem to achieve the Commonwealth's real objective—preservation of VMI, with its "adversative" training and culture, from the unwelcome intrusion of women. *See Faulkner v. Jones*, slip op. at 26 (Hall, J., concurring) ("these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later.").

ingly persuasive justification'" for it. *Hogan*, 458 U.S. at 724. There has been no such showing here. VMI's stated mission is to produce "citizen-soldiers, educated and honorable . . . who are suited for leadership in civilian life and who can provide military leadership when necessary." *United States v. Commonwealth of Virginia*, 976 F.2d 890, 893 (4th Cir. 1992) (*VMI I*). Nothing suggests, let alone provides an "exceedingly persuasive justification," that VMI's male-only admissions policy and "sexually homogenous environment" are necessary to further this mission; indeed, the co-educational United States military academies graduate far more "citizen-soldiers, educated and honorable . . . who are suited for leadership in civilian life and who can provide military leadership when necessary."

Furthermore, despite the panel majority's abundant rhetoric about "adversative" training, it never demonstrates the "requisite direct, substantial relationship" between VMI's asserted objective—producing "citizen soldiers, educated and honorable"—and the means employed to accomplish that objective. Again, the established experience at the United States military academies strongly suggests there is none. The military academies are apparently able to train soldiers , sailors, and pilots without the benefit of "adversative" training. It might even be argued that, since the military academies have abandoned "adversative" training, the provision of that training to VMI cadets, rather than preparing them to be leaders in today's Armed Forces, affirmatively disadvantaged them for military leadership roles.

Assuming, however, that "adversative" training is both desirable and essential to the VMI program, then the proposed Mary Baldwin program, which

does not include "adversative" training, cannot be "substantively comparable" to the VMI program. If "adversative" training is so critical to the VMI program that it virtually defines it, then a program without "adversative" training can never be "substantively comparable." Conversely, if the proposed program at Mary Baldwin is truly "substantively comparable" to the VMI program, then "adversative" training must not be critical to the VMI program, and so there is nothing to prevent the abolition of "adversative" training and admission of women to VMI.

Even leaving aside "adversative" training, how can a degree from a yet to be implemented supplemental program at Mary Baldwin be held "substantively comparable" to a degree from a venerable Virginia military institution that was established more than 150 years ago? As the majority acknowledges, in almost epic understatement, the alternative degree from Mary Baldwin "lacks the historical benefit and prestige of a degree from VMI." *VMI II*, 44 F.3d at 1241. People do not seek to attend VMI only for the course work or the citizenship and military training. At least as important is VMI's reputation, the opportunity to know and learn from other students, faculty, and graduates, and the ability to rely on those connections and friendships in later life. The proposed alternative program offers no remotely similar, let alone "substantively comparable," experience. Women need not be guaranteed equal "results" in this respect, but the Equal Protection Clause does require equal opportunity to obtain these results, that opportunity is being denied here.

The above constitutes a brief sketch of my problems with the panel majority's analysis. In addition, it is worth noting that the degree of judicial oversight required to implement the projected alternative program at Mary Baldwin makes clear how much remains to be accomplished before the proposed program—feeble as it is—can be converted into reality. In the meantime, VMI would continue its unconstitutional course of action. The district court, even with the supervisory assistance of this court, is simply not equipped to plan, inaugurate, and supervise a wholly novel military-leadership program within the ambience of a respected women's liberal arts college.

The panel majority notes that admission of women to VMI "would deny them the very benefit they sought" because the unique characteristics of VMI's program would be destroyed by coeducation. *VMI II*, 44 F.3d at 1233. No changes in VMI's curriculum and culture would be required, however, and its uniqueness would be fully preserved, if the Commonwealth simply ceased providing the substantial financial support it gives to VMI [4] and proposes to give to the alternative program in order to preserve VMI. Conformity with constitutional requirements would thus be immediately achieved without any judicial involvement and at a substantial saving of taxpayers' money.

Finally, it well may be, as a few members of the task force apparently suggested, that many women do not wish to attend VMI where the intended purpose is "to break down individualism and to instill

[4] It is estimated that this support last year exceeded $10 million.

uniform values" by "grating egos and setting the aggressiveness of one person against another through conflict, egalitarianism, lack of privacy, and stress—both physical and mental." *Id.* at 1239. It seems equally probable that many men would not want to be educated in such an environment. No one is arguing that women—or men—should be forced to attend VMI. The question is can they constitutionally be denied that opportunity when the Commonwealth—with tax dollars from men *and* women—supports the institution. Recently the United States eliminated its rule excluding women from combat duty, explaining that the rule was an "armour-plated ceiling" preventing the advancement of women in the military. Several months ago, one of the first women fighter pilots was killed during a practice run. Anyone who is prepared to do combat for her country—indeed, to be killed in preparation for that combat—should be eligible to apply for what she perceives to be the best possible training. As long as the Commonwealth provides support for VMI, women should be given the opportunity to attend.

Judge Murnaghan and Judge Michael have authorized me to indicate that they join in this dissent.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20051